# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1885.

No. 1101.

THE SUN MUTUAL INSURANCE COMPANY, INTERVENOR,
PLAINTIFF IN ERROR.

*vs.*

THE UNITED STATES EX REL: JUDAH HART.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 15, 1885.

37 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between United States *ex relatione* Judah Hart, plaintiff, *versus* The Board of Liquidation of the City Debt of New Orleans, defendant, The Sun Mutual Insurance Company, intervenor, No. 11090 of the docket of your said court, a manifest error hath happened, to the great damage of the said Board of Liquidation, defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8 day of August, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
*Clerk of the United States Circuit Court for the Eastern District of Louisiana.*

[Endorsed:] United States circuit court. No. 11090. United States *ex rel.* Judah Hart *versus* Board of Liquidation of the City Debt, etc. Writ of error. Filed Aug. 8, 1885. H. J. Carter, deputy clerk.

Endorsed on cover: E. Louisiana, C. C. U. S. No. 1123. The Board of Liquidation of the City Debt of New Orleans, plaintiff in error, *vs.* The United States *ex rel.* Judah Hart. Filed October 17, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Petition for Mandamus. Filed July 30th*, 1885.

To the honorable the judges of the United States circuit court in and for the fifth circuit and eastern district of Louisiana.

The petition of the United States upon the relation of Judah Hart, a citizen of the State of New York, with due respect, showeth:

That on the 3rd day of March, 1882, in the suit styled Judah Hart *vs.* The City of New Orleans, No. 9662 of the docket of this honorable court, your relator recovered a verdict and judgment at law against the city of New Orleans, a municipal corporation organized under the laws of the State of Louisiana and citizen of said State, for the sum of $121,697.18, with five per cent. per annum interest thereon from the date of said judgment, to wit: March 3rd, 1882, until paid, and costs of suit, which judgment was based on contracts for municipal purposes made from 1871 to 1877, inclusive; that from said judgment the city of New Orleans took a writ of error not operating as a supersedeas; that under and by virtue of a writ of *fieri facias* issued in said cause your petitioner levied upon certain bonus moneys due, and to be due, by the Canal & Claiborne St. Railroad Company, Orleans Railroad Company, and also

2 levied upon all the right, title, and interest of the city of New Orleans in the New Orleans Sugar Shed Company and the New Orleans sugar sheds; that proceedings were taken by the city to contest the said seizures, in which proceedings judgment was rendered in favor of your petitioner, and from which judgment the city of New Orleans took a writ of error operating as a supersedeas.

That while these causes were pending in the Supreme Court of the United States, and before the trial thereof, your petitioner and the said city of New Orleans did, on the 19th day of the month of January, 1885, by an act before Joseph D. Taylor, notary public, and under and virtue of ordinance 1068, counsel series, enter into a contract of compromise, a duly certified copy of which is hereto annexed and made part of this petition, marked Exhibit A. That under and by virtue of said compromise it was stipulated, among other things, that the city should dismiss her writs of error taken as aforesaid, pending in the Supreme Court of the United States; that your petitioner should renounce his seizure of the said sugar sheds; that your petitioner should apply the bonus due and to be due by the said railway companies to the payment of his judgment, and that, after making the deduction aforesaid, your petitioner should fund the balance of his judgment under and by virtue of the provisions of act 67 of the acts of 1884.

Now your petitioner avers that on or about the 23rd day of May, 1885, he received from the Orleans Railroad Company the sum of $2,624.12, and from the Canal and Claiborne Street Railroad Company the sum of $50,262.17. That on or about the 27th day of June, 1885, your petitioner received from the registry of the court the sum of $8,263.65, being the amount of bonus paid into the said registry by the Canal and Claiborne Street Railroad Company, and also, upon the same day, to wit, the 27th day of June, 1885, by sale

of the right of the city of New Orleans to collect the bonus due by the said two railway companies in the future, realized
3 the further sum, as a credit upon said judgment, of $4,520.

That your petitioner did further receive from the registry of the court, on the 8 day of July, 1885, the sum of $666.33, being the amount paid into the said registry by the Orleans Railroad Company for the bonus due by it.

That out of this sum your petitioner has paid to the clerk and marshal the sum of $659.70 *dollars* as costs, and that the judgment of your petitioner, which amounts, as aforesaid, to $121,697.18, with five per cent. interest from the 3d day of March, 1882, until paid, and the sum of $183.25 *dollars*, clerks' costs, and $476.45 *dollars*, marshal's costs, are entitled to the credits aforesaid, to wit: the sum of $52,886.29 on the 23d of May, 1885, the sum of $12,783.65 on the 27th day of June, 1885, and the sum of $666.33 upon the 8th day of July, 1885, leaving the amount now due to your petitioner, principal and interest, as follows: Seventy-six thousand one hundred and ninety-four $\frac{62}{100}$ dollars, with interest at 5 per cent. per annum from July 8th, 1885, until paid ($76,194.62.)

That your petitioner having complied with all the provisions of the said contract of compromise above set forth is entitled to have and receive from the Board of Liquidation of the City Debt, a corporation organized under and by virtue of the provisions of act 133 of the acts of 1880, and a citizen of this State, the balance due upon his judgment as provided in said act of compromise. Your petitioner avers that under and by virtue of the provisions of act 133 of the acts of 1880, and under and by virtue of the provisions of act 67 of the acts of the State of Louisiana of 1884, and under and by virtue of the provisions of the compromise aforesaid it is the ministerial duty of the said Board of Liquidation to cause to be prepared the bonds of the city of New Orleans, signed by the mayor and treasurer of the city of New Orleans, countersigned by the comptroller
4 of the said city, dated June 1st, 1884, and made payable in fifty years from said date or sooner, at the option of the city, bearing interest at the rate of five per cent. per annum from the date of said bonds, payable semi-annually on the 1st of June and December of each year, and the interest thereon to be represented by 100 coupons to be annexed to each bond, the said bonds and the said interest coupons annexed to be issued for such sums as may be deemed most convenient by the Board of Liquidation, payable at such place or places as may be designated in the bond in lawful money of the United States, and that it is their further duty, after causing the said bonds to be prepared, to deliver the same to your petitioner to the amount and extent of the unpaid portion of his judgment aforesaid.

Your petitioner avers that, notwithstanding the premises, this petitioner has called upon the said Board and amicably demanded that they should prepare the said bonds as designated in said act, and should deliver the same to your petitioner to the amount and extent of the unpaid portion of his said judgment, which act or acts the

said Board of Liquidation unlawfully and illegally refuse to do, to the irreparable damage and injury of your petitioner.

Your petitioner avers that the city of New Orleans has no objection to the performance of this duty on the part of this Board, but that said Board make this refusal on their own account and for reasons best known to themselves.

Wherefore, the premises and the annexed affidavit considered, your petitioner prays that an alternative writ of mandamus may be issued from this honorable court directed to the said Board of Liquidation, and each of them, and to its officers and members, directing and commanding them, and each of them, to cause to be
5 prepared, the bonds of the city of New Orleans, as provided in section 1 of the said act 67 of 1884, which bonds shall only be used for the purpose of negotiation and exchange, as provided in said act 67 of 1884, said bonds to be signed by the mayor and treasurer of the city of New Orleans, countersigned by the comptroller of said city, to be dated June 1st, 1884, and made payable fifty years from date or sooner, at the option of the city, bearing interest at the rate of five per cent. per annum from date of said bonds, payable semi-annually on the first days of June and December of each year, and the interest thereon to be represented by 100 coupons to be annexed to each bond; the said bonds and the said interest coupons annexed to be issued for such sums as may be deemed most convenient by the Board of Liquidation, payable at such place or places as may be designated in the bond in lawful money of the United States, and directing and commanding the said Board of Liquidation to deliver to your petitioners the bonds so prepared as aforesaid to the amount, extent, and value of the balance due as above stated upon the judgment of your petitioner.

And further ordering, directing, and commanding the said Board to do and to continue to do all the acts and things required of them under and by virtue of the said act 67 of 1884, and said act 133 of the acts of 1880, which may be necessary, proper, and lawful to be done, in order to provide for the payment, redemption, and cancellation of the said bonds.

And your petitioner prays that the said Board of Liquidation of the City of New Orleans may be cited to answer this demand, and that upon due hearing your honors may make the said alternative writ of mandamus peremptory, with costs.

(Signed) E. H. FARRAR,
(Signed) A. G. BRICE, *Att'ys.*

6 Personally came and appeared before me, the undersigned authority, Edgar H. Farrar, who, being duly sworn, deposes and says that he is one of the attorneys of Judah Hart, the relator in the above petition, who is now absent from the State, and that all the facts and allegations therein contained are true and correct to the best of his knowledge and belief.

(Signed) EDGAR H. FARRAR.

Sworn to and subscribed before me, this 3d day of July, 1885.

(Signed) JOS. MAILLE,
*Not. Pub.*

*Order.*

Considering the petition and affidavit, let an alternative writ of mandamus issue as therein prayed for, returnable on the — day of ——, 1885.

*Consent.*

The undersigned relator and defendant's intervenor hereby waive trial by jury and submit this cause to the court for adjudication.

(Sig.) E. H. FARRAR, *Att'y Relator.*
(Sig.) H. C. MILLER, *For B'd Liq.*
(Signed) LEOVY & LEOVY, AND J. P. BLAIR,
(Signed) E. D. WHITE, *Attys for Intervenor.*

Service of this petition is accepted; citation and issuance of alternative writ of mandamus is waived.

(Signed) H. C. MILLER,
*Atty for B'd Liq.*

7 It is agreed that the Sun Mutual Insurance Company shall join in this cause to aid the Board of Liquidation in asserting the unconstitutionality of act 67 of 1884.

It is further admitted and agreed that the averments of said petition as to the ownership of bonds issued under act 67 of 1882 are true.

(Signed) E. H. FARRAR,
*Att'y Judah Hart.*

*Answer. Filed July 30th,* 1885.

U. S. Circuit C.

UNITED STATES *ex rel.* Judah Hart
*vs.*
THE BOARD OF LIQUIDATION. } No. 11090.

Now comes the Board of Liquidation, charged with the bonded debt of New Orleans and its liquidation, under the acts of the Legislature of Louisiana, No. 133 of 1880, No. 58 of 1882, No. 58 of 1882, which acts are specially referred to for fuller explanation and greater certainty, and for answer to the petition of the relator, answers and says:

That this defendant believes to be true that the relator recovered judgment and issued his *fi. fa.* thereon; that thereon there was a contest, judgment, and writ of error taken by the city of New Orleans, as stated in relator's petition. The defendant also believes
8 and admits that there were proceedings had for a compromise of relator's judgment, as stated in the petition, but as to the amounts derived and credits on said judgment relator has no knowledge.

This respondent further shows that the act No. 58 of 1882 of the Legislature of Louisiana, entitled An act to authorize the city to renew and extend payment of her bonds outstanding, etc. ——

There was dedicated and pledged to the bondholders who accepted

that act all property of the city of New Orleans not dedicated to public use, expressed in the 1st section of the act, and in previous legislation; that is, in the 5th section of act No. 133 of 1880, and there was also pledged and dedicated to the said bondholders for payment of their bonds the surplus of the premium bond tax levied under the act No. 31 of 1876 to adjust, regulate, and provide for the bonded debt of this city, etc., and said pledge and dedication appears in the 7th section of said act of 1882.

This respondent further shows that said act was accepted, and bonds to the amount of upwards of five millions of dollars were exchanged and funded into the bonds authorized to be exchanged and issued under said act of 1882, and are now outstanding and unpaid; that the property and taxes thus pledged constitute part of, and an essential part of, the provisions made by law for the payment of said bonds and of the interest thereon; that the taxes levied to pay the interest on the bonds, as specified in the 5th section of the act, and the pledged assets and taxes specified in the 6th and 7th sections constitute the provisions for the retirement of the bonds in a sinking fund, as well as to provide for the interest thereon.

And respondent shows that all said taxes, surplus of premium
9 bond tax, and assets so pledged by the act of 1882 are necessary to pay and provide for the principal and interest upon said bonds; that each and all these provisions constitute the contract between the city of New Orleans, and the act itself so declares in express terms in its 10th section, which this respondent is enjoined by the act to carry out and enforce.

And this defendant further shows that prior to the said act of 1882 the act No. 31 of 1876 had dedicated the entire premium bond tax to the bond- issued under that act; that bonds to the extent of twelve millions of dollars were issued and exchanged for that amount of the then outstanding bonds of the city. The holders thus exchanging their bonds rely on the provisions in said act of 1876, constituting the contract between the city and the bondholders, and declared a contract by the express terms of that act.

This defendant shows that the fifteen millions of bonds issued under the said acts of 1876 & 1858 are now outstanding and unpaid, dependent upon the provisions aforesaid made for their payment, and upon the faithful application and enforcement of said provisions by this Board, the defendant herein, and that by and through said provisions and their enforcement the credit of the city on its bonded debt has been maintained and the interest on said bonded debt paid.

That this defendant shows that said act of 1884, under which the relator claims the bonds for which he sues, provides that the Board of Liquidation shall thereafter apply all assets not diverted to public use and all drawn premium bonds to the payment of the floating debt of this city merged into judgments, except floating debt claims prior to 1879, for which floating debt, in form of judgments prior
10 to 1879, this relator is required to issue bonds, the bonds and interest thereon to be paid from and out of the said property, real and personal, of the city not dedicated to public use, and by and with

drawn premium bonds in the possession of the city, all of which is more fully shown by the said act No. 67 of 1884, and specially by the 3d and 4th sections thereof.

Defendant shows that these sections propose a distinct diversion from the bonded debt of the taxes, assets, and property pledged and devoted to the bonded debt by the said acts of 1882 and of 1876; that at each drawing of these premium bonds for payment out of the premium bond tax a large number of such bonds are held by the city, *i. e.*, are unissued, and not extant in the hands of holders; that the city holds a large amount of said drawn premium bonds already drawn; that hence drawn premium bonds in possession of the city, as used in the act of 1884, and directed to be applied to the bonds of 1884, is the surplus of the premium bond tax, and the direction of the act of 1884 is that this surplus shall be applied to these floating debt bonds, in distinct violation of the 7th section of the act of 1882, which pledges that surplus to the bonded debt, and the 3d section of the act of 1884, which deals with property and assets, proposes to take from the bonded debt the property and assets pledged to the bonded debt by said act of 1882.

And this defendant shows that these provisions of the act of 1884 violate the contract with the bondholders, formed by the acts of 1858 and 1876, propose to impair if not destroy that contract, and are null and void, because they violate the 10th section of article 1st of the constitution, prohibiting legislation impairing the obligation of contracts.

That this respondent, charged with the execution of these
11 acts of 1858 and 1876, have, for the reasons set forth, declined and refused to issue the bonds unless ordered to do so by the court, prohibited as the Board is under heavy penalties from diverting from the bonded debt the taxes and assets pledged for its payment.

Wherefore defendant prays for judgment in its favor with costs.

(Signed) HEN'Y C. MILLER,
*Att'y for Board of Liq.*

*Intervention of the Sun Mutal Insurance Company. Filed July 30th*, 1885.

United States Circuit Court for the Eastern District of Louisiana.

STATE OF LOUISIANA *ex rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION. } No. 11090.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

The petition of the Sun Mutual Insurance Company, a corporation duly created and organized under the laws of the State of Louisiana and having its domicile in the city of New Orleans, in said State, respectfully represents—

That it desires to make itself a party to this litigation to oppose the demand of the plaintiff herein, and that it has an interest in the

controversy now pending in this cause exceeding the sum of ten thousand dollars in value.

That it is the holder and owner of a number of bonds of the
12 city of New Orleans, to the amount of more than $100,000, which were either extended by intervenor or acquired by it as extended, in accordance with and in reliance upon the provisions of act No. 58 of the acts of the General Assembly of the State of Louisiana for the year 1882. That the value and validity of these said extended bonds will be depreciated more than 25 per cent. if the demand of the plaintiff herein is granted, and the validity of said act No. 67 of 1884 be established, and the Board of Liquidation directed to execute the provisions of said act.

That it also owns and controls a number of bonds of the city of New Orleans known as "premium bonds" to the amount of more than $30,000, which were acquired on the faith of the provisions of act No. 31 of the acts of the General Assembly of this State for the year 1876; that if the Board of Liquidation is ordered to carry out the provisions of said act No. 67 of 1884 the contract rights of intervenor under said act No. 31 of 1876 will be impaired, the value of said premium bonds depreciated, and a loss on this account of more than ($5,000) five thousand dollars will be suffered by intervenor.

Petitioner and intervenor further represents that said act No. 58 of 1882 makes certain provisions for the payment of the principal and interest of the bonds extended to be retired under its provisions, and said acts pledges and dedicate certain funds and revenues of the city of New Orleans for this purpose, and directs the said Board of Liquidation to employ said pledged funds and revenues exclusively for the payment of the interest and principal of extended bonds of the character owned by intervenor. That said act No. 58 of
1882 is, from its nature and from the express enactment of
13 sec. 10 of said act, a contract between the State of Louisiana, the city of New Orleans, and your petitioner and intervenor, who accepted its terms and extended its bonds in reliance thereon.

Petitioner and intervenor avers that said act No. 67 of 1884 impairs the obligation of this contract contained in said act No. 58 of 1882, and seeks to divert the funds and revenues pledged by the said act of 1882 from the purposes to which they had, by said act, been inviolably dedicated, and directs the said Board of Liquidation to apply these same funds and resources exclusively to the payments of the principal and interest of the bonds, the issuance of which is provided for in said act No. 67 of 1884.

That said act No. 67 of 1884 is violative of section 10, article 1st, of the Constitution of the United States, and is unconstitutional, null, and void.

Wherefore this intervenor prays that this honorable [court] grant it leave to intervene herein and join the defendant, and further prays that said act No. 67 of 1884 be declared unconstitutional, and that the demand of relator herein be rejected with costs; or, in event that relator be declared to have any rights enforceable under and by

virtue of said act No. 67 of 1884, intervenor prays that its contract rights under acts No. 31 of 1876 and No. 58 of 1882 be protected, and that judgment be rendered herein denying the right of plaintiff to an order directing the said Board of Liquidation, defendant, to alter the destination of the debt and interest tax and other funds and revenues pledged by said act No. 58 of 1882, and to employ them for other purposes than those to which by said act of 1882 they were directed to be applied.

14 Further prays for costs and general relief, &c.

(Signed) LEOVY & LEOVY,
(Signed) J. P. BLAIR,
(Signed) WHITE & SAUNDERS,
*Att'ys for Intervenor.*

*Order.*

Let this petition of intervention be filed.
(Signed) ALECK BOARMAN, *Judge.*

Service of this intervention and citation thereon is waived, and consent is given that the said Sun Mutual Insurance Company shall join in this cause to aid the Board of Liquidation in asserting the unconstitutionality of act 67 of 1884.

It is further admitted and agreed that the averments of said petition as to the ownership of bonds issued under act 58 of 1882 and of "premium bonds" are true.

(Signed) E. H. FARRAR,
*Att'y for Relator,*
By E. B. KRUTTSCHNITT.
(Signed) HE'Y C. MILLER,
*Att'y for B'd Liq.*

*Answer to the Intervention of the Sun Mutual Insurance Company.*
*Filed July 30th,* 1885.

U. S. Circuit Court, E. Dist. of La.

U. S. *ex rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION OF THE CITY DEBT *et als.* } No. 11090.

Now comes Judah Hart, and for answer to the intervention of the Sun Mutual Insurance Co. avers and says: That the act No. 67 of 1884 is valid and constitutional.

15

Wherefore he prays that said intervention may be rejected with costs.

(Signed) E. H. FARRAR,
(Signed) A. G. BRICE,
*Atty's Judah Hart.*

*Answer to Intervention. Filed July 30th, 1885.*

U. S. Circuit Court.

THE UNITED STATES *ex rel.* Judah Hart
*vs.*
THE BOARD OF LIQUIDATION. } No. 11090.

Now comes the Board of Liquidation, and for answer to the petition of intervention it answers and says: That it has set forth in its answer its reasons for not issuing the bonds the relator demands, and to that answer it refers and makes it part hereof.

(Signed) HEN'Y C. MILLER,
*Att'y for Board of Liq.*

16 *Defendant's & Intervenor's Bill of Exceptions No. 1. Filed July 30th, 1885.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION. } No. 11090.

Bill of Exception No. 1.

Be it remembered that on the trial of this case the defendant and intervenor herein requested the judge, who had found the facts to be as stated in the admission filed herein, to hold, as a matter of law, that the relator was not entitled to a mandamus directing the issuance of the bonds as prayed for, which finding the judge refused to make, on the ground that the act of 1884, relied upon by the relator, was a valid and constitutional act, and did not impair the obligation of intervenor's contracts, despite the state of facts disclosed by the admission and statement of facts found by the judge. To which ruling the intervenor and the defendant excepted, and tendered this their bill of exception in open court, after due reading of the same and submission to opposite counsel, which was signed by the judge in order to test the verity of its contents.

(Signed) ALECK BOARMAN, *Judge.*

*Defendant's & Intervenor's Bill of Exceptions No. 2. Filed July 30th, 1885.*

17 United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION. } No. 11090.

Bill of Exception No. 2.

Be it remembered that on the trial of this case the judge, having

found the state of facts disclosed in the admission made by all the parties to be as stated, was requested by the defendant and the intervenor to conclude, as a matter of law, from said admitted state of facts, that the relator was not entitled to a decree directing the issuance of the mandamus authorizing the board to apply the city debt fund to the payment of said bonds, as prayed for by relator, even if same were ordered to be issued, because, under the state of facts found, the entire city debt fund was pledged to the payment of the bonded debt, and therefore the diversion thereof to the relator for bonds claimed by him would impair the obligation of the contract of intervenor; which finding of law the judge refused to make, on the ground that the intervenor was not entitled, under his contract, to the said city debt fund, but that the same, under the act of 1884, was applicable to the bonds claimed by the relator; to which ruling the intervenor and the defendant excepted, and tendered this their bill of exception in open court in the presence of opposite counsel, which was signed by the judge in order to test the verity of its contents.

(Signed) ALECK BOARMAN, *Judge.*

18 *Defendant's and Intervenor's Bill of Exceptions No.* 3. *Filed July 30th*, 1885.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex rel* Judah Hart
*vs.*
BOARD OF LIQUIDATION. } No. 11090.

Bill of Exception No. 3.

Be it remembered that on the trial of this case the judge having found the facts to be as admitted by the parties and stated in the admission of facts found in the record, the defendant & intervenor requested the judge to find, as a matter of law, that the surplus of the drawn premium bonds was dedicated entirely to the bonds of the intervenor, and, therefore, that the provision of the act of 1884 was unconstitutional, null, and void, because it impaired the obligation of intervenor's contract, which ruling of law, under the agreed state of facts, the court refused to make, on the ground that the intervenor was not exclusively entitled to the surplus of the premium bond tax, but that same, under act of 1884, was applicable and could be applied to the bonds provided for in said act. To which ruling the intervenor and the defendant excepted, and tenderd this their bill of exception in open court, in the presence of the opposite counsel, which was signed by the judge in order to attest the verity of its contents.

(Signed) ALECK BOARMAN, *Judge.*

19 *Intervenor's Bill of Exceptions No.* 4. *Filed July* 30*th*, 1885.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION. } No. 11090.

Bill of Exception No. 4.

Be it remembered that on the trial of this case, the court having found the facts to be as stated in the admission of facts found in the record, the intervenor requested the court to find, as a matter of law, that the drawn premium bonds held by the city and not already issued in exchange for outstanding bonds constitute a part and parcel of the surplus of the premium bond tax, and that the said surplus so constituted was exclusively dedicated to the bonded debt of said city, exclusive of the bonds claimed by the relator, which ruling the judge refused to make, on the ground that said drawn premium bonds, although a part of the surplus, were not exclusively dedicated to the bonds of intervenors, but were also, under the act of 1884, applicable to the bonds provided in said act and claimed by the relator herein. To which ruling counsel of intervenor excepted and tendered this his bill of exception in open court, after submission to opposite counsel, which was signed by the judge in order to attest the verity of its contents.

(Signed) ALECK BOARMAN, *Judge.*

20 *Findings of Fact & Judgment. July* 30, 1885.

United States Circuit Court, Eastern District of Louisiana.

STATE *ex. rel.* Judah Hart
*vs.*
BOARD OF LIQUIDATION OF THE CITY DEBT. } No. 11090.

In this cause, this day submitted to the court on the petition, answer, petition of intervention of the Sun Mutual Insurance Company and answers thereto, and upon the written admissions and affidavits in the record, a jury having been waived in writing, as per waiver of record herein, the court finds the facts as follows:

1st. That on the third day of March, 1882, in the suit styled Judah Hart *vs.* The City of New Orleans, No. 9662 of the docket of this honorable court, relator recovered a verdict and judgment at law against the City of New Orleans, a municipal corporation, organized under the laws of the State of Louisiana and a citizen of said State, for the sum of $121,697.18, with five per cent. per annum interest thereon from the date of said judgment, to wit, March 3rd, 1882, until paid, and costs of suit, which said judgment was based on contracts for municipal purposes, made from 1871 to 1877, inclusive, and that from said judgment the city of New Orleans took a writ of error not operating as a supersedeas; that under *fi. fa.* issued in said cause relator levied upon certain moneys due and to be due by the Canal and Claiborne Street Railroad Company and by the Orleans

Railroad Company to the city of New Orleans, and also levied upon all the right, title, and interest of the city of New Orleans in the New Orleans Sugar Shed Company, and in the New Orleans Sugar Sheds.

2nd. That proceedings were taken by the said city to con-
21 test said seizures, in which proceedings judgment was ren-
dered in favor of relator, and from which judgment the city of New Orleans took a writ of error operating as a supersedeas.

3rd. That while these causes were pending in the Supreme Court of the United States, and before the trial thereof, relator and said city did, on the 19th day of January, 1885, enter into a compromise under and by virtue whereof it was stipulated, among other things, that the said city should dismiss her writs of error taken as aforesaid; that relator should renounce his seizure of said sugar sheds; that relator should apply the bonus due and to become due by said railroad companies to the payment of the judgment, and that after making the deductions aforesaid relator should fund the balance of his judgment under and by virtue of the provisions of act 67 of the acts of the Legislature of the State of Louisiana in the year 1884.

4th. That under the writ of *fi. fa.* aforesaid, and under and by virtue of other proceedings taken in execution of said judgment aforesaid, certain sums of money have been realized whereby the amount due to relator under his said judgment has become reduced to $76,194.62, with interest at five per cent. per annum from the 8th day of ——, 1885, until paid, subject to be increased by a claim of the marshal for commissions, now pending in rule in this case.

5th. That relator has called upon the Board of Liquidation of the City Debt, a corporation organized under and by virtue of the provisions of act 133 of the acts of the Legislature of the State of Louisiana of the year 1880, and has amicably demanded that the said Board should prepare bonds, as designated in said act 67 of the acts of the Legislature of the State of Louisiana of the year 1884,
and should deliver the same to relator to the amount and
22 extent of the unpaid portion of his judgment as aforesaid,
but that said Board of Liquidation has refused to prepare said bonds, or to deliver the same to relator, or in any manner to comply with relator's said demand.

6th. That the city of New Orleans makes no objection to the preparation and issue of said bonds by said Board, or to its compliance with relator's request.

| | |
|---|---|
| 7th. That there are outstanding premium bonds | $7,918,280 00 |
| Premium bonds unissued and held by city | 6,736,700 00 |
| Premium bonds bought in by the city with funds arising from the sale of railroad franchises and held by her | 3,567,360 00 |
| Total | $18,222,340 00 |
| 8th. That the premium bond tax levied during the year 1883 was | $565,455 51 |
| That the tax collected to date for said year was | 466,938 55 |

That the amount required, carrying out the premium bond plan for 1883, if the said plan were carried out in its integrity, was ---------- 682,720 00

That the premium bonds, interest, and premiums paid during the year 1883 were as follows:

| | |
|---|---|
| Paid bonds, interest, and premium outstanding--- | $319,366 00 |
| Am't of drawn bonds bought and held by the city- | 139,224 00 |
| Amount of unissued bonds represented by the city- | 224,160 00 |
| Total ---------- | $682,750 00 |

| | |
|---|---|
| 9th. Premium bond tax levied for 1884 ---------- | $573,144 07 |
| Collected to date---------- | 429,155 47 |
| Amount required per premium bond plan for 1884- | 703,750 00 |

Premium bonds paid during 1884:

| | |
|---|---|
| Paid bonds outstanding ---------- | 346,836 00 |
| 23 Represented by drawn bonds bought by the city or held by her ---------- | 121,924 00 |
| Drawn bonds unissued and represented by the city- | 234,990 00 |

10th. That the entire amount of back taxes prior to 1879, to wit, for the years 1876, 1877, and 1878, received to date by the Board of Liquidation, amounts to ---------- 48,841 63

And that no other revenue from back taxes prior to 1879 has to date come into the hands of the said Board.

11th. That the coupon tax, other than premium bonds collected to date for the year 1883, amounted to ---------- $335,035 01

That the coupons payable and paid in the year 1883 were ---------- 496,029 70

Difference ---------- $160,994 69

That this difference was paid in money remaining in the debt fund principally, consequent on drawn premium bonds represented or held by the city.

| | |
|---|---|
| That the coupon tax collected to date for the year 1884 was---------- | $429,155 38 |
| Coupons payable in the year 1884 ---------- | 496,029 70 |
| Difference ---------- | $66,874 32 |

Which difference was made up by the money due the drawn premium bonds represented or held by the city.

12th. That the sum required to carry out in its integrity the premium bond plan, considering all the bonds as issued and in the hands of other persons than the city of New Orleans, has never, except for the years 1876 and 1877, been produced by the premium bond tax.

| | | |
|---|---|---|
| 24 | The premium bond plan required for the year 1883 | $682,754 00 |
| | The total 5 mill premium bond tax levied in 1883 | 565,455 00 |
| | Difference | $117,299 00 |
| | Premium bond plan required for 1884 | $703,750 00 |
| | Five mill tax levied in 1884 | 573,144 00 |
| | Difference | $130,606 00 |

The deficit in 1883 and 1884 did not become apparent, because of the fact that the funds corresponding to the drawn premium bonds held by the city remained in the hands of the city and had not to be paid out.

| | |
|---|---|
| 13th. Total yearly interest on bonds other than premium bonds | $496,029 00 |
| Extended under act 58 of 1882 | 168,294 00 |
| Total yearly interest on certificate ten-year bonds | 115,680 00 |
| Total | $780,003 00 |

14th. That the amount furnished by the premium bond tax was never adequate, except for the years 1876 and 1877, to carry out the premium bond plan if all the premium bonds had been issued; hence the surplus of the premium bond plan represents no surplus tax over and above the amount required to carry out the plan in its integrity and thus pay the outstanding premium bonds and the sum or sums which accrue to the city as the holder or representative of drawn premium bonds, either not issued or bought in by her. If the premium bonds covered by the plan and now represented by the city were issued to outsiders there would be an annual deficit in the premium bond plan itself, as shown by the following figures:

| | | |
|---|---|---|
| 25 | Premium bond plan required for 1883 | $682,750 00 |
| | Five mill tax levied for 1883 | 565,445 00 |
| | Difference | $117,305 00 |
| | Premium bond plan required for 1884 | $703,750 00 |
| | Five mill tax levied for 1884 | 573,144 00 |
| | Difference | $130,606 00 |

15th. That the coupon tax for the various bonds and extended bonds, as collected to date, has been inadequate to pay the interest on such bonds, the deficiency being made up by the money in the hands of the city as the holder of drawn premium bonds unissued or held by her.

16th. That no bonds have been issued under the provisions of act 133 of the session of 1880.

17th. That under the act No. 58 of 1882 the Board of Liquidation has issued bonds to the amount of $4,609,217.50, now extant and unpaid, and for which holders of bonds and coupons, outstanding at date of the act of 1882, have surrendered and given up that amount of such outstanding bonds and coupons.

18th. That the assessed value of property in the city of New Orleans is as follows:

| | | |
|---|---|---|
| For the year 1883 about | ---------- | $113,000,000 00 |
| 1884 " | ---------- | 114,000,000 00 |
| 1885 " | ---------- | 124,000,000 00 |

That about ten per cent. of the uncollected premium bond tax from 1876 to 1879 and about forty per cent. of the same uncollected tax from 1880 to 1884 are collectible in course of time.

And upon the said facts the court finds the law to be:

1st. That relator is entitled to a writ of mandamus as by him prayed for, directed to the Board of Liquidation of the City
26 Debt, a body corporate under the laws of the State of Louisiana, and to its officers and members, directing and commanding them, and each of them, to cause to be prepared bonds of the city of New Orleans, as provided by section 1 of the act 67 of 1884, which bonds shall only be used for the purpose of negotiation and exchange, as provided in said act, and which bonds shall be signed by the mayor and treasurer of the city of New Orleans, countersigned by the comptroller of the said city, dated June 1st, 1884, and made payable in fifty years from said date or sooner, at the option of the city, bearing interest at the rate of five per cent. per annum from the date of said bonds, payable semi-annually, on the first of June and December of each year, and the interest thereon to be represented by one hundred coupons to be annexed to each bond; the said bonds and the said interest coupons to be issued for such sums as may be deemed most convenient by the Board of Liquidation, payable at such place or places as may be designated in the bond in lawful money of the United States, and directing and commanding said Board to deliver to relator the bonds so prepared as aforesaid, to the amount, extent, and value of the balance due, as above stated, upon the judgment of relator. And further ordering, directing, and commanding said Board to do and continue to do all the acts and things required by them under and by virtue of said act 67 of 1884 and said act 133 of the acts of 1880, which may be necessary and proper to be done in order to provide for the payment, redemption, and cancellation of said bonds, and especially to apply all the avails of the city debt fund, as well as all uncollected revenues of said city anterior to the year 1879, when collected—

1st. To the payment of the interest on the bonds authorized herein, in the event that the tax authorized by section 11 of
27 act 133, approved April 10th, 1880, be not levied.

2nd. To the redemption and cancellation of the said bonds, provided the bids for the same shall be by sealed proposals, and that preference shall be given to the lowest bidder, and provided, further,

that no bids above the par value of said bonds shall be accepted.

3rd. That, for the further redemption of said bonds, said Board is required and commanded, after each and every allotment of series of premium bonds, to advertise for sealed proposals for the exchange of drawn premium bonds in the possession of the city for the bonds authorized by this decree to the amount of fifty thousand dollars of said bonds issued under act 67 of 1884, provided that no exchange be made unless preference be given to the lowest bidder.

And the court considering the law and the evidence as above found, and for reasons orally assigned, and especially for the reasons set forth in the opinion of the Honorable E. C. Billings, a judge of this court, in his written opinion on file in the suit, entitled The Sun Mutual Insurance Company *vs.* The Board of Liquidation of the City of New Orleans, No. 10935 of the docket of this court, and which said opinion is referred to as a part of this opinion and decree.

It is now ordered, adjudged, and decreed that a writ of peremptory mandamus issue herein to the Board of Liquidation of the City Debt, a body corporate under the laws of the State of Louisiana, and to each member of said Board, and to its officers, directing and commanding them, and each of them, to cause to be prepared bonds by the city of New Orleans, as provided in section 1 of act 67 of 1884, which bonds shall only be used for the purposes of negotiation and exchange, as provided in said act, and which bonds shall be signed by the mayor and treasurer of the city of New Orleans, countersigned by the comptroller of said city,
28 dated June 1st, 1884, and made payable in fifty years from said date or sooner, at the option of the city, bearing interest at the rate of five per cent. per annum from the date of said bonds, payable semi-annually on the 1st of June and December of each year, and the interest thereon to be represented by one hundred coupons, to be annexed to each bond; the said bonds and the said interest coupons to be issued for such sums as may be deemed most convenient by the Board of Liquidation, payable at such place or places as may be designated in the bond in lawful money of the United States, and directing and commanding said board to deliver to relator the bonds so prepared as aforesaid to the amount, extent, and value of the balance, due as before stated, upon the judgment of relator, and further ordering, directing, and commanding said board to do, and continue to do, all the acts and things required by them, under and by virtue of said act 67 of 1884 and said act 133 of the acts of 1880, which may be necessary and proper to be done in order to provide for the payment, redemption, and cancellation of said bonds, and especially to apply all the avails of the city debt fund, as well as all uncollected revenues of said city anterior to the year 1879, when collected—

1st. To the payment of the interest on the bonds authorized herein in the event that the tax authorized by section 11 of act 133, approved April 10th, 1880, be not levied.

2nd. To the redemption and cancellation of the said bonds, provided the bids for the same shall be by sealed proposals, and that

preference shall be given to the lowest bidder, and provided, further, that no bids above the par value of said bonds shall be accepted.

3rd. That for the further redemption of said bonds said board is required and commanded, after each and every allotment of
29 series of premium bonds, to advertise for sealed proposals for the exchange of drawn premium bonds in the possession of the city for the bonds authorized by this decree to the amount of fifty thousand dollars of said bonds issued under act 67 of 1884, provided that no exchange be made unless preference be given to the lowest bidder.

It is further ordered, adjudged, and decreed that the intervention of the Sun Mutual Insurance Company be, and the same is hereby, dismissed at the costs of said intervenor.

It is further ordered that the relator recover of defendant all other costs herein.

Judgment rendered July 30th, 1885.

Judgment signed July 30th, 1885.

(Signed) ALECK BOARMAN, *Judge.*

All delays and formalities as to the signature of this judgment are waived, and it is agreed that it be signed now, this 30th day of July, 1885, in vacation as in term time.

(Signed) E. H. FARRAR,
*Att'y Judah Hart.*

(Signed) H. J. LEOVY, J. P. BLAIR, & E. D. WHITE,
*Att'y- for Intervenors.*

(Signed) H. C. MILLER,
*For B'd Liq.*

30 *Application for Writ of Error by Intervenor. Filed July* 30, 1885.

UNITED STATES OF AMERICA, *Eastern District of Louisiana,* } *ss:*

To the honorable justices of the Supreme Court of the United States:

And now comes the Sun Mutual Insurance Company, by H. J. Leovy, A. P. Blair, and E. D. White, its attorneys, and complains that in the record and proceedings, and also in the rendition of judgment in a suit between the United States *ex rel.* Judah Hart, plaintiff, and the Board of Liquidation of the City Debt, defendant, tried in the circuit court of the United States for the eastern district of Louisiana, at —— term thereof, A. D. eighteen hundred and ——, and in which judgment was rendered against it on the — day of ——, A. D. eighteen hundred and ——, manifest error hath intervened, to the great damage of the said Board of Liquidation of the City Debt, and of intervenor, the said Sun Mutual Insurance Company.

Wherefore it prays for the allowance of a writ of error to operate as a supersedeas, and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

Allowed to operate as a supersedeas on intervenor's furnishing bond, according to law, in the sum of one thousand dollars.

July 30, 1885.

("Signed") ALECK BOARMAN, *Judge.*

We consent that the writ of error, to operate as a supersedeas, be allowed on a bond for one thousand dollars.

("Signed") E. H. FARRAR,
*Att'y Judah Hart.*

31 *Bond for Writ of Error. Filed Aug.* 8, 1885.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES *ex rel.* JUDAH HART
*vs.*
BOARD OF LIQUIDATION OF THE CITY DEBT. } No. 11090.

Know all men by these presents that we, the Sun Mutual Insurance Company, as principal, and Leonard M. Finley, as sure*ties*, are held and firmly bound unto Judah Hart in the full and just sum of one thousand dollars, to be paid to the said Judah Hart, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fourth day of August, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding session in and for the district of Louisiana, in a suit depending in said circuit court, wherein the said Judah Hart was plaintiff, and the Board of Liquidation of the City Debt of New Orleans was defendant, and the said Sun Mutual Insurance Company was intervenor, judgment was rendered against the said intervenor and the said Board of Liquidation of the City Debt of New Orleans, defendant, and the said Sun Mutual Insurance Company, intervenor, having obtained a writ of error to operate as a supersedeas, and filed a copy thereof in the clerk's office of the said circuit court, to
32 reverse the judgment in the aforesaid suit, and a citation directed to the said Judah Hart, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Sun Mutual Insurance Company shall prosecute its writ to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) THE SUN MUTUAL INS. CO.,
Per L. M. FINLEY, *V. P.*
L. M. FINLEY.

UNITED STATES OF AMERICA, } ss:
*District of Louisiana,* }

Personally appeared Leonard M. Finley, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, in the State of Louisiana, and is worth the full sum of one thousand dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) LEONARD M. FINLEY.

Subscribed and sworn before me this 4th day of August, 1885.

(Signed) SAM'L FLOWER,
*Notary Public and ex-officio Commissioner.*

Citation on within-referred-to writ of error waived and bond approved.

(Signed) E. B. KRUTTSCHNITT,
*Att'y for Judah Hart.*

33 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 32 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of United States *ex rel.* Judah Hart *vs.* The Board of Liquidation, Sun Mutual Ins. Co., intervenor, No. 11090 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 5 day of October, A. D. 1885.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 5 day of October, A. D. 1885.

DON A. PARDEE, *Judge.*

34 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of

the judgment of a plea which is in the said circuit court before you, or some of you, between United States *ex relatione* Judah Hart, plaintiff, *versus* The Board of Liquidation of the City Debt of New Orleans, defendant, The Sun Mutual Insurance Company, intervenor, No. 11090 of the docket of your said court, a manifest error hath happened, to the great damage of the said Sun Mutual Insurance Company, intervenor, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8 day of August, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
*Clerk of the United States Circuit Court for the Eastern District of Louisiana.*

[Endorsed:] United States circuit court. No. 11090. United States *ex rel.* Judah Hart *versus* Board of Liquidation of the City Debt, etc. Writ of error. Filed Aug. 8, 1885. H. J. Carter, deputy clerk.

Endorsed on cover: E. Louisiana, C. C. U. S. No. 1101. The Sun Mutual Insurance Company, intervenor, plaintiff in error, *vs.* The United States *ex rel.* Judah Hart. Filed October 15, 1885.

Supreme Court, U.S.
FILED
DEC 19 1896
JAMES H. MCKENNEY,
Clerk.

# U. S. SUPREME COURT.

No. 1123.

THE BOARD OF LIQUIDATION, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES, *Ex rel.* JUDAH HART.

*Brief for the Board of Liquidation, Plaintiff in Error.*

HENRY C. MILLER,
*For the Board of Liquidation.*

L. Graham & Son, Printers, 109 Gravier St., New Orleans.

the judgment of a plea which is in the said circuit court before you, or some of you, between United States *ex relatione* Judah Hart, plaintiff, *versus* The Board of Liquidation of the City Debt of New Orleans, defendant, The Sun Mutual Insurance Company, intervenor, No. 11090 of the docket of your said court, a manifest error hath happened, to the great damage of the said Sun Mutual Insurance Company, intervenor, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8 day of August, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
*Clerk of the United States Circuit Court for the Eastern District of Louisiana.*

[Endorsed:] United States circuit court. No. 11090. United States *ex rel.* Judah Hart *versus* Board of Liquidation of the City Debt, etc. Writ of error. Filed Aug. 8, 1885. H. J. Carter, deputy clerk.

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Office Supreme Court U.S.
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# U. S. SUPREME COURT.

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THE BOARD OF LIQUIDATION, PLAINTIFF IN ERROR,

vs.

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*Brief for the Board of Liquidation, Plaintiff in Error.*

HENRY C. MILLER,
*For the Board of Liquidation.*

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

# U. S. SUPREME COURT.

No. 1123.

THE BOARD OF LIQUIDATION, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, EX REL. JUDAH HART.

*Brief for the Board of Liquidation, Plaintiff in Error.*

## STATEMENT OF FACTS.

In 1876, the Legislature passed an act intended to adjust its bonded debt. It offered to all the then bond creditors, of the City, the bond known as the Premium Bond. Bondholders holding bonds to the extent of eleven millions of dollars. availed of the provisions of the act. The bonded debt of the City, was then about, twenty millions. This Premium Bond act, directed the levy of a tax of one half of one per cent. to be applied exclusively to the redemption in principal and interest, of these Premium Bonds. The bonds to be redeemed with this tax, were to be determined by an annual drawing from the wheel, so that each year, a certain amount of the bonded debt, was to be paid. The entire bonded debt of the City, was divided into series, and all the numbers of these series, were placed in the wheel. As a large amount of the bonded debt, was not funded in these Premium Bonds, and as each year, there was to be levied a tax to pay all the series drawn from the wheel, it was certain, that a large amount of the Premium Bond tax would not be required. For, from the tax, the City would have to pay only the drawn series, extant in the hands of holders, who had funded their bonds into Premiums. Thus a surplus of the tax, was bound to accumulate in the hands of the City; i. e., the tax accruing to the drawn series not extant, but held by the city. The act directed that surplus, to be employed in redeeming old bonds, this direction being contained in the fifth section of he act, that after the allottment of series, i. e., setting

aside the series to be paid, the drawn series, not extant in the hands of holders, but held by the city, should be applied to take up old bonds, if the bids of the old bondholders were satisfactory, if not, then the drawn premiums in the hands of the City, were to be used to take up premiums extant, in the hands of ho'ders. If, under the operation of this section, drawn series held by the city, were issued, whether to the old or premium bond holders, then the drawn series would have to be paid. So, the first section, in effect disposed of what is called, the surplus of the Premium Bond tax. It gave to the old bond holders the preference, in its distribution: if they made no bids, then the surplus was to go to the Premium Bond holders. This surlus was pledged to one or the other class of bondholders, who might choose to avail, of the act of 1876. Thus much is said, to show what is the surplus of this tax, as it is an element in this case. See act of 1876, p. 31 Section 1 to 7, 11, 12 and 15, printed in the appendix.

But the old bondholders, evinced no desire to give up their bonds for premiums. They asserted their legal rights, to ave taxes levied, and each year brought the renewal of applications to the Court, for writs of mandamus to compel the levy of taxes. A very large class of these bondholders, who held out against the fascinations of the lottery scheme as they termed it, of the funding act of 1876, brought their complaints to this Court, and obtained the relief they sought. See State ex Rel., Southern Bank vs. New Orleans, U. S. Rec. p.

In the meantime this Premium Bond tax continued to be levied, and is to be levied for years to come. See the 6th and 11th Sections of the act. Finally, in 1882, there was an adjustment, with all classes of bondholders. The Legislature authorized an issue of bonds, to be exchanged for all old bonds, i.e., not funded in the Premium Bonds. The old bonds were to be surrendered, under conditions that they were to revive in full force, if the city ever defaulted on its new

issue of bonds. An additional tax was directed to be levied for the new bonds, and besides, the act pledged for the payment of these new bonds, this surplus of the Premium Bond tax. The new tax and the surplus of the Premium Bond tax, derived each year from the Premium Bond tax, were to be turned over to the Board of Liquidation, placed to the credit of the City debt fund and applied exclusively to the objects of the act, i.e., the redemption of the new bonds of 1882, authorized to be issued. No language could make this pledge, stronger than expressed in the act. There was another pledge. A previous act No. 133, of 1880, had devoted all property not required for public use, and all funds therefrom arising to the bonded debt. See Act of 1880 in appendix. The act of 1882, pledged all these assets to the new bonds of 1882, and declared the act in all its terms, provisions, obligations and conditions a contract between the city and the bondholders. Without this express declaration, the pledges of the acts, would be a contract and irrevocable, if accepted by the bondholders. But the express provision is in the act—See the act No. 58, of 1882, session act, p. 66, all the important sections of which, are in the appendix.

The surplus of the Premium Bond tax then, and thereafter to be derived under each annual levy of the tax, and the funds derived from the City property, were to be held and applied by the Board of Liquidation, as a trust fund for the bondholders, and the Board and each member of it was inhibited, under severe penalties, from ever diverting the surpus or funds or any part of them, from the purposes of the Act, *i. e.* the payment of the interest and principal of the bonds of 1882. See the 11th Section of the Act.

The provisions of this Act of 1882, were accepted, and four and a half millions of the old bonds, were funded into the bonds of 1882. Rec. p. 15. And as already stated, the provisions of the Act of 1876, had been accepted by the Premium bondholders, to the extent of Eleven thousand dollars in round

numbers, of which Seven thousand nine hundred and eighteen dollars, are outstanding and unpaid. Rec. pp. 12, 13. The Premium Bond Act, gave the surplus to the old bonds first, or to the Premium bondolder. The Act of 1882 awarded the surplus to the new bonds of 1882, in effect to the old bondholders, to whom the bonds of 1882 were issued. Under either act, there was an absolute exclusion from this surplus, of all, save bondholders. It was an absolute dedication to them, and for them. None other, were ever to participate in that surplus. The statement of facts, shows the acceptance of the Act by the Premium Bondholders, and the amount of bonds funded into premiums on the faith of the dedication. The Court finds, also the acceptance of the Act of 1882, by the bondholders, and the large amount of bonds, funded into the new bonds of 1882, on the faith of the pledges of this surplus and City property, contained in the Act of 1882. Rec. p. 15. Under the Act of 1882, the bonded debt of New Orleans has been adjusted: its bond creditors satisfied, and the litigation respecting the debt ended. The Premium bondholder, is content with the dispositions made by the Act of 1882, of the surplus already dedicated to the bonded debt, by the Premium Bond Act of 1876. The bondholder who rejected the Premium Bond Act, is satisfied with the surplus and the tax given to him, by the Act of 1882. All the bondholders then, stand before this Court, on the contracts formed by the Acts of 1876 and 1882; and all the facts are found by the lower Court, essential to make the contract, as well as to show the absolute necessity for the payment of the bonded debt, of the pledged surplus and City property.

After the Act of 1882, and the completion of the contract it embodies, the Legislature undertook to enact the Act, No. 67, of 1884. Session Acts, p. 89. (See appendix.) It provided for the issue of bonds, to take up the judgment debts of the City of New Orleans. Not bonded debts. It provided for the levy of no tax, for the bonds thus to be issued. It provided nothing, except what it proposed to take, from

the bond creditors. In the 3d section, the Act undertook to give to the bonds of 1884, the property of the City not essential to public use. But the property had already been devoted, to the bonded debt. The Act awarded to the bonds of 1884, the uncollected revenues prior to the year 1879. These, if ever collected, would embrace the uncollected premium bond taxes of past years, the property of the bondholder, if ever realized. And lastly, this Act of 1884, proposed to take away from the bondholders the surplus of the premium bond tax, and give it to the bonds of 1884. This is proposed to be accomplished, by the 4th section of the Act of 1884, which enacts that after each allotment of series of Premium Bonds to be paid, the Board of Liquidation shall advertise for the exchange of drawn premiums, held by the City, for the bonds of 1884. These drawn premiums when issued for the bonds of 1884, would have to be paid from the premium bond tax, and thus take the "surplus" of that tax awarded to the bonds of 1882, by the Act of 1882. The Act of 1884, for the payment of the judgment debt, was a distinct, avowed encroachment, on the provisions previously made for the bond creditors.

In this condition, Judah Hart, a judgment creditor of the City of New Orleans, applied to the Board of Liquidation to issue to him bonds, for his judgment debt, under the Act of 1884. In the appreciation of the Board of Liquidation, the Act of 1884, was utterly incapable of execution, by reason of the fact, that all the provisions made by it, for the payment of the bonds of 1884, were in direct conflict with the provisions for payment of the bonded debt, made by the Acts of 1876 and 1882. The Board conceived that the Act of 1884 was therefore void and of no effect, and therefore declined to issue the bonds of 1884. Judah Hart, the judgment creditor, thereupon applied to the United States Circuit Court, for a mandamus to compel the Board of Liquidation, to issue the bonds.

See Petition, Rec. p. 1, et seq.

To this application, the Board of Liquidation filed its

answer, setting up the provisions in the Acts of 1876, and of 1882, applying the surplus of the Premium Bond tax, and other assets of the City, to the payment of the bonded debt; the answer averred the acceptance by the bondholders of the Acts of 1876 and 1882, and that these Acts thereby became contracts with the bondholders; the answer denied the competency of the Act of 1884, to appropriate to the judgment creditors, the surplus of the Premium Bond taxes and other assets pledged to the bonded creditors by the provisions of the Acts of 1876 and 1882; the answer claimed that the provision in the Act of 1884 making this appropriation was unconstitutional and void because it impaired the obligation of contracts; the answer further set up that that Act, dependent as it was for its execution, upon provisions which were unconstitutional and void, could not be executed, and hence the Board of Liquidation had refused to issue the bonds applied for by relator.

See Record pages 4-6.

There was an Intervention in the suit by the Sun Mutual Insurance Company, holder of the Premium Bonds issued under the Act of 1876, as well as holder of a large amount of the bonds issued under the Act of 1884. Se Louisiana Code of Practice, Art. 389. The Intervention asserted the ocntracts with the bond holders; denied the validity of the Act of 1884; alleged that act was in violation of the contracts of the bondholders; and joined the Board of Liquidation in resisting the issue of bonds under the Act of 1884. See that Intervention Record, p. 7-8. The judgment of the Court, was in favor of the relator, Judah Hart, applying for the mandamus. The Mandamus was issued, directing the Board to issue the bonds and that judgment was based upon the finding of facts at pp. 11-17 of the Record. Exceptions were taken to this judgment. The exceptions asserted the propositions of law, relied upon, by the Board of Liquidation, and excepted to the judgment of the Court adverse to these propositions. See exceptions, R. pp. 9–11. The case is now here on writ of error, prosecuted by the Board of Liquidation and by the Intervenor, from the judgment of the United States Circuit Court.

## Assignment of Errors.

1st. The Court erred in not holding, that the Acts of 1876 and of 1882, were contracts between the City and the bondholders, which dedicated it to the bond creditors of the City, the surplus of the Premium Bond tax, and all property of the City of New Orleans, not devoted to public use.

2. The Court erred in not maintaining that contract was impaired by the Act No. 67 of 1884, which proposed to take from the bondholders of the surplus of the Premium Bond tax, and other assets pledged to by previous acts, and give said surplus and assets to the judgment creditors, not bond creditors, of the city: and for and on account of said priovision, contained in the Act of 1884, tending to impair the obligation of the contract with the bond holders, the Court erred, in not deciding that the act of 1884 was void, for repugnancy to the contract clause in the 1st Article and 10th Section of the Constitution of the United States.

3rd. That the payment of the bonds directed to be issued by the Act of 1884, being depenendent for payment on provisions which were void, because they tended to impair the contract with the bondholders, no other means of payment being provided: and as the Act itself stripped, as it must be, of these unconstitutional provisions being utterly incapable of execution, the Court erred, in not deciding that the Act in its entirety, was void and inoperative for repugnancy to the Constitution of the United States.

4th. That the Court erred in making the Mandamus peremptory, ordering the Board to issue the bonds, and the Court should have decided that the bonds could not be issued because the Act was void which undertook to direct their issue.

## Argument.

The Acts of 1876 and 1882, both pledged to the bond creditors of the City of New Orieans the surplus of the Premium Bond tax. That surplus is the portion of the Premium Bond tax, which, under the operations of the Act

of 1876, already ex plained, accrues to Premium Bonds never issued but held by the city itself. It is the surplus, denoted in the 5th section of the act of 1876, as drawn premiums in the possession of the city, and to which reference is made in the 7th section of the Act of 1882, as the surplus of the Premium Bond tax. The asssets of the City not required for public use, are pledged to the bond creditors, by the 5th section of the Act of 1880, (See appendix) passed in accordance with article 254 of the State Constitution of 1880 (printed in the Appendix), and are pledged again by the Act of 1882, in the 6th section. The pledge to the bonded debt, of the assets not required for the public use was recognized by the Supreme Court of the State in the Board of liquidation vs. New Orleans, 32d Louisiana Annual, Rec. p. 915. The pledges then to the bondholders, both of the surplus of the tax, to be derived, for all the time to come, during which the premium bond tax is to be levied, and of the assets not dedicated to public use, stand out distinct. So does the acceptance of the pledges, by the bondholders, and the resulting contract with them. Thus, the law and the acceptance constituting the contract is exhibited, which this Court is called on to recognize and maintain

Constitution United States 1st Article, Section 10.
Cooley on Constitution limitation p. 177, *et seq.*
Van Hoffman vs. Quincy, 4 Wall. p. 535.
Binghampton Bridge Case, 3d Wall. p. 51.

Nor, is the impairment of that contrac by this Act of 1884, if carried into effect, less distinct, than the contract. That Act lays its grasp, upon these assets, pledged to the bondholdesr. It seeks to take from the bondholders, the taxes (*i. e.*, this surplus of the premium bond tax over and above the amount required for extant premium bonds) levied for bondholders alone, pledged to them by successive legislative acts, and which the bondholders have accepted. And the necessity of these provisions for the bondholders, if anything besides their acceptance was requisite, is conspiscuosly shown in the finding of facts. The proposition then that the Act of 1884, tends to impair the bondholders contract, is plainly and fully

supported. The act of 1884 is an appropriation of that which belongs to the bondholder, under his contract, and the law that proposes that appropriation, carries its condemnation. The Act is in gross disregard of the contract and in the teeth of the provision in the Federal Constitution, that protects.

See Constitution U. S., Art. 1, Sec. 10.

4th Wall. p. 525.

Nor is this Act of 1884, to be deemed capable of partial execution, its unconstitutional provisions omitted. The modicum to be derived from back taxes, prior to 1879, which this act proposes to apply to the judgment debts, is not the semblance of a provision, for the payment of the bonds. The real provisions for the payment of the bonds of 1884, are the bondholder's taxes, and the assets pledged to him. Without these provisions, the act completely falls of its purpose. The object of this act, is linked to means of execution, not in the power of the legislature to grant. The act cannot be upheld for any purpose, because of the repugnancy to the Constitution of the United States, of those provisions, on which the execution of the act depends. The vice of the unconstitutional sections pervade the entire act, and stamps it with nullity. In such cases the entire act is void.

See Cooley's Constitutional limitations, p. 176, et seq.

It is submitted the Board of Liquidation properly refused to issue the bonds of 1884. under an act stamped with such ~~impunity~~ infirmity, and that the judgment of the lower Court should be reversed.

Respectfully submitted,

HENRY C. MILLER,

*For the Board of Liquidation.*

# APPENDIX.

## ACT NO. 31, OF 1876.

Unimportant Sections Omitted.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Mayor and Administrators of the city of New Orleans, or such other officers, aldermen or administrators as may hereafter be ordained and established, be, and they are hereby authorized and directed to exchange all recognized and valid bonds of the city of New Orleans and the late cities of Jefferson and Carrollton for bonds known as the premium bonds of the city of New Orleans, in accordance with the plan adopted by the City Council, and approved by the Mayor on the twenty-fifth May and thirty-first August, 1875. The said premium bonds shall be dated the first of September, 1875, and bear interest at the rate of five per cent. per annum, from the fifteenth of July, 1875; they shall be signed by the Mayor, the Administrator of Finance, and the Administrator of Public Accounts, as commissioners of the consolidated debt, and countersigned, when issued, by such parties as the Council have designated heretofore, or may hereafter designate, with the authorization of the supervising committee hereafter named.

SEC. 2. *Be it further enacted, etc.*, That all outstanding bonds bearing interest shall have the interest computed up to the first day of July, 1875, and thereafter the said bonds, when exchanged, shall bear interest as provided in the ordinance above ratified, which provides for the premium bonds.

SEC. 5. *Be it further enacted, etc.*, That until all the bonds are funded as herein provided it shall be the duty of the commissioners of consolidated debt and the said supervising committee, immediately after the allotment of series, to invite by sealed proposals for the exchange of old bonds for drawn premium bonds remaining in the possession of the city; such proposals shall state the lowest price at which the old bonds are offered, payable in the drawn premium bonds valued upon their face, capital and interest; the said bids, if any, to be opened by the commissioners of the consolidated debt and at least one of the said supervising committee, the right to reject any or all bids being reserved to the City Council; *provided*, that when bids are rejected, further offers shall be invited, either before or after distribution of premiums for exchange of all other bonds, or for cash, as the case may be.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of the City Council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of the premium bonds; together with premium included, in the several allotments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the Council annually to levy an equal and uniform tax on all the assessed property within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allotments, and the funds so raised shall be placed to the credit of an account to be called the premium bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium bond tax, and shall be separately mentioned in the tax rolls and receipts; *provided*, that the taxable power of the corporation of the city of New Orleans for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full, complete and final payment of the said premium bonds, exceed the rate of one and one-half per centum on the dollar of all the assessed value of property subject to taxation within the limits of the said city of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and taxpayers of the said city, so as to authorize any holder of said premium bonds, resident or taxpayer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the city of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

SEC. 11. *Be it further enacted, etc.*, That in addition to the obligation of the said city to provide annually the sum required for the execution of the premium bond plan, at least a tax of one-half of one per cent. annually, to be used in the execution of the provisions of this act; and if the product of said half of one per cent. be more than adequate for the payment of the drawn premium bonds, and the premiums as above provided, then the surplus to be used in retiring the outstanding bonds; *provided*, said half of one per cent. taxation be considered as part of the one and a half per cent. taxation to which the taxing power of the city is limited in this act; the intention of

this section being to limit the city taxation to one and one-half per cent. annually until the entire extinction of the bonded debt; to authorize the Council to levy annually out of the one and one-half per cent. taxation a sum adequate to the annual execution of said premium bond plan, and after the year 1881 to levy at least one-half of one per cent. for the carrying out of said plan, and to distribute the surplus realized therefrom, if any, in retiring the outstanding bonded debt.

SEC. 15. *Be it further enacted, etc.*, That this act in all its provisions and limitations be held a contract between the city of New Orleans, the holders of said premium bonds and the tax-payers or residents of said city, so as to authorize any of the contracting parties to resist any and all contracting of debt by the said city, or increase of taxation above the rate limited in the previous provisions of this act.

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ARTICLE 254 OF THE STATE CONSTITUTION.

The General Assembly, at its next session after the adoption of this constitution, shall exact such legislation as may be proper to liquidate the indebtedness of the city of New Orleans, and apply its assets to the satisfaction thereof. It shall have authority to cancel the charter of said city, and remit its inhabitants to another form of government, if necessary. In any such new form of government no salary shall exceed three thousand five hundred dollars.

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ACT NO. 133, OF 1880.

Unimportant Sections Omitted.

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SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That for the purpose of liquidating, reducing and consolidating the debt of the city of New Orleans, as hereinafter specified, a permanent syndicate of six citizens of the said city is hereby created. The said syndicate shall be chosen as follows: Two by the Governor of the State of Louisiana, two by the Lieutenant Governor, and two by the Speaker of the House of Representatives, and the Mayor of the City of New Orleans, the Treasurer and the Comptroller thereof, as hereinafter provided, shall be ex-officio members of said syndicate; provided, that in case no change is made in the present city government, the present commissioners of the consolidated debt, shall act as ex-officio members of said syndicate, and the members of the syndicate so named, shall fill all vacancies in their number from death, resignation or otherwise.

SEC. 2. *Be it further enacted, etc.*, That the commissioners of the consolidated debt, or the city officers provided and named in

section one of this Act, and the syndicate hereby created, shall constitute a board of liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the bonded debt of the city of New Orleans. The Board of Liquidation shall cause to be prepared, bonds of the city of New Orleans, which bonds shall be used only for the purpose of negotiation or of exchange, as hereafter provided. "The Act goes on to provide for the issue of bonds to take up the extant bonded debt." [No bonds were issued under this Act, but the bonds were issued by the Board of Liquidation under the subsequent Act of 1884.]

SEC. 3. *Be it further enacted, etc.*, That the Board of Liquidation, of the city debt, be and it is hereby authorized and empowered to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created up to the date of the passage of this Act, whether represented by bonds of various classes or by judgments, either by the sale of the new bonds, created under this act and appliance of proceeds to the purchase of such old olbigations, or by exchange of the new bonds against said old obligations, on such terms as may be agreed upon between the holders of the said old obligations and the Board of Liquidation; provided, the new bonds shall not be sold for a less sum than eighty cents, in cash, on the dollar, and that no exchange shall be made at a greater rate than fifty cents in new bonds per one dollar of the face value of the old obligation with interest accrued thereon; and provided further, that the entire issue of the new bonds sold or exchanged, as above provided, shall not exceed in all ten millions of dollars.

SEC. 5. *Be it further enacted, etc.* That it shall be the duty of the city authorities, as soon as possible after the organization of the board of liquidation of the city debt, to turn over and transfer to the said board all the property of the City of New Orleans, both real and personal, not dedicated to public use, and the board of liquidation shall be and is hereby empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable, the proceeds of such sale or sales to be deposited with the fiscal agent of the board at credit of "city debt fund."

SEC. 6. *Be it further enacted, etc.* That nothing in this act shall be construed as effecting or in any manner impairing the Act 31 of 1876, commonly known as the "Premium Bond Act," but it will be the duty of the city authorities to turn over and transfer to the board of liquidation of the city debt, all moneys collected on account of the tax levied in accordance with the provisions of the premium bond act; and it shall be the duty of the board of liquidation to apportion the proceeds of said tax and apply the same *pro rata*, and in the proportion which each form of bonded debt shall bear to the entire amount of the city's debt; and such portions of the

said proceeds of tax as shall not properly belong to the outstanding amount of premium bonds shall be applied to the payment of interest on the bonds created under this act.

SEC. 8. Unimportant.

SEC. 9, 10 and 11, unimportant.

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## THE ACT No. 58 OF 1882,

Omitting the Unimportant Sections.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That the city of New Orleans, acting through the Board of Liquidation of the city debt, or other duly authorized officers, be and she is hereby authorized and empowered to extend the bonded indebtedness of said city, other than Premium Bonds, outstanding at the passage and promulgation of this act, for the period of forty years, from January 1, 1883, at a rate of interest not exceeding six per cent.; *provided*, the city shall have the right to call in said bonds, so renewed or extended for payment at par after the year 1895, upon giving notice to that effect during a period of three months.

SEC. 2. *Be it further enacted, etc.*, That the provisions of the foregoing section be and they are hereby extended to all bonded obligations of the city, except Premium Bonds, whether due or to become due, including such as may have been merged into judgments, but for which no tax, special or otherwise, has yet been levied; *provided*, nothing in this act shall be considered as a waiver of prescription which may have accrued or may accrue on such bonds in favor of the city.

SEC. 3. *Be it further enacted, etc.*, That to each bond extended or renewed, a certificate or annex, signed by the Mayor and the Administrator of Finance, or Treasurer of said city, shall be securely affixed, which certificate, in express terms, shall import an obligation on the part of the city to pay the principal of said extended bond in forty years from a date not later than the first of July, 1883, with interest as aforesaid; and said certificate shall fully and accurately describe the bond to which it is affixed, and the coupons of interest thereon not yet matured, and shall be of no effect unless accompanied by said bond, which shall be stamped to correspond with the number and description of the certificate, and an accurate registry shall be kept recording both bond and certificate; and if the bonds to be renewed have been merged in judgment, a certificate of full satisfaction and renunciation of all rights under the judgment shall be attached, and the judgment cancelled and annulled in the records of the Court, and on the books of the Department of Accounts or Comptroller, if it has been registered under Act 5 of 1870. Coupons of interest payable at the rate of three per cent., semi-annually, shall be attached to and

delivered with said certificate, and shall relate to the dates of maturity of the coupons on the extended bonds, beginning with the earliest coupon maturing after January 1, 1883, and continuing during the period of forty years; *provided*, that no bonds shall be extended unless all the unmatured coupons falling due after January 1, 1883, are attached thereto; *and provided further*, that the coupons of the extended bond shall be surrendered, with the corresponding coupons of the certificate, when the latter coupons are paid. The said certificates shall be numbered in the order of the applications therefor, and when called in for payment under the operation of the city's option, the last and highest numbers outstanding shall be called first and interest thereon shall cease at the maturity of the said call. The said extension, during its continuance, shall interrupt all prescription of every kind on said bonds or coupons, and shall not operate any novation thereof, nor shall it be deemed in any manner as altering, weakening or impairing the original contract obligations aforesaid, or the rights and remedies of the holders thereof, under pre-existing laws or constitutions, so that in case of default or non-payment at any time after due demand of the interest stipulated and agreed upon, or of failure to pay the principal thereof when due, then in that case the extension of time granted for the payment of the principal of said bonds and the interest shall, *ipso facto*, be null and void and of no effect, and the holder or holders of said bonds shall be restored to all his or their original rights and remedies, and be entitled to claim and enforce payment of interest at the time and rates originally stipulated, and payment of the principal at maturity, in accordance with and under the laws by which said bonds were originally issued and in force at the time of their creation as if no such extension had ever been stipulated or agreed upon, as herein provided.

SEC. 4. *Be it further enacted, etc.*, That in order to provide for the payment of matured coupons of outstanding bonds, up to and including January 1, 1883, for which no tax has been levied, the city of New Orleans, acting through the said Board of Liquidation of the city debt, be and is hereby empowered and instructed to deliver to the holder of any valid coupons issued by the said city of New Orleans, matured or to fall due prior to January 2, 1883, and for which no judgment tax shall have been levied, a certificate importing an obligation to pay the sum of the face of said coupons and the interest thereon, at the rate of six per cent. per annum, from maturity thereof until January 1, 1883 Said certificate shall be dated January 1, 1883, and be payable in ten years from date or sooner, at the option of the said city; it shall accurately describe the coupon or coupons in exchange for which it is to be delivered, and said coupons shall first be deposited for safe keeping with the said Board of Liquidation, and an accurate registry shall be made by said Board of both the coupons and

the corresponding certificates. The said registry shall carefully note the date and number of each deposit of coupons, as aforesaid, in the order of deposit, and the corresponding certificate shall be numbered successively in the same order and without regard to the time of actual issue. The option of redemption reserved to the city, shall begin on January 4, 1884, the last and highest numbers of the certificate being first redeemed, and all to be redeemed successively in the same order. One month's public notice shall be given by said city of the amounts and numbers of the certificates it will cause to be redeemed. The said certificates shall bear the interest at the rate of three per cent. semi-annually until paid, to be represented by coupons attached to and numbered identically with said certificates; provided, that said interest shall cease upon any certificate one month after notice as aforesaid shall have been published that the certificate will be paid. Said certificate shall be negotiable and transferable by delivery only without endorsement, and shall invest the holder thereof, with all the rights, remedies and privileges of the original holders of the coupons in exchange for which they were issued; and in case of non-payment of either the interest or principal of said certificates punctually when due, the holder may immediately, without further process of law, recover from the city the coupons originally deposited as aforesaid, and may thereupon proceed against the city under the original bond contract, without the operation of any prescription or novation and as is provided in Section 1 of this act in the case of the extension of outstanding bonds.

SEC. 5. *Be it further enacted, etc.*, That in view of the enforcement by judicial process of the payment of past due bonds and coupons, with interest and costs, the city of New Orleans is hereby authorized and directed, in order to provide for the punctual payment of the interest and principal of all outstanding bonds and certificates for matured coupons extended, as provided in Section 3, except Premium Bonds, to levy on all property within its territorial limits, liable to taxation for other purposes, at the same time and in the same way and on the same tax bill, and to be enforced and collected as are the ordinary city taxes, an annual tax sufficient to pay punctually the interest on all outstanding bonds and extended coupons as aforesaid, when due, which said tax shall never exceed one-half of one per cent. nor be less than one-quarter of one per cent. on the assessed valuation of all taxable property as aforesaid, and the proceeds of said tax shall be duly turned over as collected to the Board of Liquidation of the City Debt, in the same manner as the Premium Bond tax, to be by them deposited to the credit of the City Debt Fund, and to be applied exclusively to the objects and purposes of this act.

SEC. 6. *Be it further enacted, etc.*, That all funds now, or that may be at the time of the passage of this act, in the hands of

the Board of Liquidation of the City Debt under existing laws, shall be deposited with the Fiscal Agent of the Board to the credit of the amount known as the City Debt Fund, which fund shall be applied exclusively to the purchase, on the most favorable terms, not exceeding par of the face value of any of the outstanding bonds or coupons, and the certificates therefor of said city, which are extended to be retired under the provision of this act; *provided*, that said City Debt Fund shall be used first to provide for, and pay the interest on the bonds and certificates contemplated herein; and it shall be the duty of the Council, in its annual budget, to make an appropriation to carry out the provisions of this act.

SEC. 7. *Be it further enacted, etc.*, That the surplus proceeds, if any, of the Premium Bond tax of each year remaining in the hands of the Board of Liquidation of the city debt, or surplus on hand at the time of the passage of this act, after all the drawn series. interest and premiums thereon, exigible or due to the holders thereof have been provided for or fully paid, shall also be deposited with the Fiscal Agent of the said Board to the credit of the account known as the City Debt Fund, and applied exclusively as provided in Section 5.

SEC. 10. *Be it further enacted, etc.*, That this act, in all its parts, provisions, terms, conditions, obligations and limitations, is to be deemed and to constitute a valid, binding contract between the State of Louisiana, the city of New Orleans, its residents, citizens and taxpayers and the holders of the bonds herein authorized to be extended, and the judicial process of the State of Louisiana, now authorized by law, or in force at the creation of said bonded debt as aforesaid, may be resorted to and is to be recognized and applied to the judges thereof, for the enforcement of its provisions in favor of any party having and showing just cause for complaint or injury or a violation of any of the provisions thereof.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made a felony, punishable with fine not exceeding $5,000, and imprisonment at hard labor not exceeding five years, for the Fiscal Agent, the Mayor, or any other officer of the city of New Orleans, or of its clerks, subordinates, or employes of any description whatever, to feloniously misapply, misappropriate or embezzle any of the funds, taxes, assets or property designed in this act to liquidate and pay said bonded debt, or the interest thereof, or to divert the same, or any part thereof from the legitimate use and purposes herein provided, and such persons or persons, on conviction thereof, according to law, shall be punished accordingly.

SEC. 12. *Be it further enacted, etc.*, That any legal proceeding instituted to prevent, hinder, delay or obstruct the operation of this act, or any of its provisions, in whole or in part, after its promulgation as a law, shall be tried summarily and by preference over all other causes or proceeding, whether the Court,

having jurisdiction, be in vacation or not; and if appealed to the Supreme Court of the State of Louisiana, it shall be tried and determined by preference, whether said Court be in regular session or in vacation; and it is hereby made the duty of the judges thereof, if in vacation, to determine the controversy within the least delay, and the decree pronounced shall become final on the twentieth day thereafter, unless a rehearing be granted, in which latter event, the cause shall be heard *de novo* and determined by said Court, and the decree pronounced thereon shall become final then without further delay.

R. N. OGDEN,
*Speaker of the House of Representatives.*
GEO. L. WALTON,
*President pro tem. of the Senate.*

Approved June 30, 1882.

S. D. McENERY,
*Governor of the State of Louisiana.*

A true copy:
WILL. A. STRONG,
*Secretary of State.*

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THE ACT OF 1884.

Unimportant Sections Omitted.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That Section 2, of Act No. 133, approved April 10th, 1880, be amended and re-enacted so as to read: That the commissioners of the consolidated debt, or the city officers, provided and named in Section 1st of this Act, and the syndicate hereby created, shall constitute a Board of Liquidation of the city debt, and the said Board shall have exclusive control and direction of all matters relating to the judgment and bonded debt of the City of New Orleans. The Board of Liquidation shall cause to be prepared bonds of the City of New Orleans, which bonds shall only be used for the purpose of negotiation or exchange, as hereinafter provided. The said bonds shall be signed by the Mayor and Treasurer of the City of New Orleans, and countersigned by the Comptroller of said city; they shall be dated June 1st, 1884, and be made payable in fifty years from said date, or sooner, at the option of the city, and bear interest at the rate of five per cent. per annum from the date of said bonds, payable semi-annually, on the first days of June and December of each year; said interest to be represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most

convenient by the Board of Liquidation, and be made payable at such place or places as may be designated in the bond, but the said bonds shall be made payable, interest and principal, in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.*, That Section 3d of Act No. 133, approved April 10th, 1880, be amended and re-enacted so as to read: That the said Board of Liquidation of the city debt be and it is hereby authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, under the provisions of Act No. 5, of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879, and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments, at present rendered against said city, and to such floating debt or claims against said city for 1878, and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and canceling said judgment debts, the said board is authorized and required either to sell the bonds to be issued under this act at not less than their par value and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments.

SEC. 3. *Be it further enacted, etc.*, That section five of Act No. 133, approved April 10th, 1880, be amended and re-enacted so as to read: That it shall be the duty of the city of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this act, all property of the city of New Orleans, real and personal, not dedicated to public use; provided, that in the sale of batture property, which is herein included, the right of the city to all future accretions shall be reserved, all assets of said city realized, and to be realized, except such assets and revenues as pertain to the administration of said city, and necessary for the support of the same as at present authorized, all uncollected revenues of said city anterior to the year 1879, when collected; and the said Board is hereby authorized and required to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said Board may deem to be to the best interests of the city, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected. First, to the payment of the interest on the bonds authorized herein in the event that the tax authorized by section eleven of said Act No. 133, approved April 10th, 1880, be not levied; second, to the redemption and cancellation of the said bonds; provided, that bids for the sale of the

same shall be by sealed proposals, and that preference shall be given to the lowest bidder; and provided further, that no bids above the par value of said bonds shall be accepted.

SEC. 4. *Be it further enacted, etc.*, That for the further redemption of said bonds, the said Board of Liquidation is hereby authorized and required after each and every allotment of series following the passage of this Act, to advertise for sealed proposals for the exchange of drawn premium bonds in possession of the city for the bonds authorized herein, to the amount of fifty thousand dollars, of said bonds issued under this Act; provided, that no exchange be made unless preference be given to the lowest bidder.

Office Supreme Court U. S.
FILED.
DEC 22 1885
JAMES H. McKENNEY.
CLERK.

# SUPREME COURT OF THE UNITED STATES,

*OCTOBER TERM, 1885.*

No. 1101.

SUN MUTUAL INSURANCE CO., INTERVENOR, PLAINTIFF IN ERROR,

*versus*

UNITED STATES, EX REL. JUDAH HART.

## BRIEF ON BEHALF OF THE SUN MUTUAL INSURANCE COMPANY, INTERVENOR, PLAINTIFF IN ERROR.

LEOVY & LEOVY,
E. D. WHITE,
J. P. BLAIR,
*Counsel for the Sun Mutual Insurance Co., Plaintiff in Error.*

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## STATEMENT.

At its regular session in 1884, the General Assembly of the State of Louisiana passed an Act, known as Act No. 67 of 1884, the object of which was to provide for the retiring and canceling of all executory judgments at that time rendered against the City of New Orleans, and of the floating debt or claims against the City for 1878 and previous years, merged or to be merged into judgments.

The Board of Liquidation, an incorporated body charged by law with all duties connected with the City Debt and its settlement, was directed to issue bonds of the City of New Orleans and to use them in retiring the aforesaid judgments, either by exchanging bonds for judgments, or by the sale of the bonds and

appliance of the proceeds to the payment of judgments. The Board of Liquidation were directed to apply certain designated funds and revenues of the City exclusively to the payment of the interest, and ultimately of the principal, of the bonds to be issued under the provisions of this Act.

The relator, Judah Hart, is a judgment creditor of the City of New Orleans. The object of the present suit is to compel, by mandamus, the Board of Liquidation to carry out the provisions of Act 67 of 1884, to issue the bonds and to devote to their redemption and cancellation the funds and revenues designated in the Act. (Petition, Record, p 1 ). On the ground that a prior Act of the General Assembly, namely, Act No. 58 of 1882, had pledged and dedicated to the bondholders who accepted the Act, the same funds and revenues which the Act of 1884 directed to be applied to the payment of the bonds to be issued under its provisions, the Board of Liquidation refused to carry out the provisions of the Act of 1884, alleging that Act No. 58 of 1882 embodied a contract, an essential part of which were the provisions for the payment of the bonds which, to the extent of over five millions of dollars, were issued under that Act; that the diversion of funds sought to be authorized by the Act of 1884 was an impairment of the contract, and that the Act of 1884 was, therefore, unconstitutional, null and void. (Answer, Record, p 4.)

The Board of Liquidation, as stated above, is an incorporated body, created by Act No. 133 of 1880, and charged with the settlement of the bonded debt of the City of New Orleans. In addition to the taxes levied to pay the debt, of which the Board is to take charge, there are transferred by the law to the Board all the assets and property, real and personal, present or *in futuro*, of the City of New Orleans, not dedicated to public use, to be sold and disposed of by the Board, the proceeds of which are to be known as the "City Debt Fund," and applied to the payment of the bonded debt. The Court is referred to Act No. 133 of 1880

p. 180, and to 32 La. Annual, p. 915, Board, etc. vs. City, where the powers and duties of the Board of Liquidation are more fully defined and explained.

The Act of 1880 contained also a scheme for the liquidation and consolidation of the City Debt. This part of the Act, however, proved inoperative, and, as will be seen from the statement of facts found by the trial Judge, (Record, p. 14, no bonds were ever issued under its provisions.

By permission of Court and consent of the parties, the Sun Mutual Insurance Company intervened to oppose the relator's demand. Intervenor is the owner of a number of bonds of the City of New Orleans, known as extended consolidated bonds. These bonds, exceeding $100,000 in amount, were either extended by the intervenor or acquired by it, as extended in accordance with, and in reliance upon the provisions of Act No. 58 of 1882, above referred to. This Act was intended to relieve the financial embarrassment of the City of New Orleans by inducing her bonded creditors to extend the time of the payment of their bonds for a period of forty years, and to exchange unpaid coupons of outstanding bonds, due and exigible, for bonds to be issued under that Act, payable in ten years, and designated City Certificate Bonds. In consideration of this extension, the State and City agreed to devote certain funds and revenues exclusively to the payment of the principal and interest of the bonds extended to be retired under the provisions of this Act, and forbade the Board of Liquidation, under severe penalties, to divert these pledged funds to any other purposes than those prescribed in the Act. Under the Act of 1882, there have been issued bonds to the amount of $4,609,217.50, which are now extant, and for which holders of bonds and coupons, outstanding at the date of the Act, have surrendered and given up that amount of such outstanding bonds and coupons. (See statement of facts found by Court, Record, p. 15).

Alleging that this Act of 1882 was a contract between the State of Louisiana and the City of New Orleans and the bond-holders who accepted its terms, and extended their bonds in reliance thereon, and that Act No. 67 of 1884 impairs the obligation of the contract, by seeking to divert the funds and revenues, pledged by the Act of 1882, from the purposes to which by said Act they had been inviolably dedicated, and directing the Board of Liquidation to apply these same funds and resources exclusively to the payment of the bonds, the issuance of which is provided for in said Act No. 67 of 1884, the intervenor sought in the lower court to have its contract rights protected and relator's prayer for a mandamus rejected. (Petition of intervention, Record, p. 6 ).

Intervenor is also the owner of a number of bonds of the City of New Orleans, known as "premium bonds," which were issued under the authority of Act No. 31 of 1876. We will endeavor to show in another part of this brief that intervenor's contract rights under this Act are violated by the aforesaid Act of 1884, within the constitutional prohibition against the impairment of contracts.

The lower court rendered judgment, making the mandamus peremptory and ordering the Board of Liquidation to issue bonds and provide for their payment, as required by Act No. 67 of 1884. The Board and the Sun Insurance Company, intervenor, have both sued out writs of error operating as a *supersedeas*. The record contains a finding of facts by the trial Judge. From the facts, as found, the Judge was requested by the defendant and intervenor to draw certain conclusions of law, and, from his adverse rulings on these points, four bills of exceptions were taken. (Record, p. 9 ). The bills of exception but repeat and emphasize the errors of law which we claim are to be found in the lower court's conclusions of law, and which are patent on the Record.

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ARGUMENT.

The full text of Act No. 58 of 1882 and of Act No. 67 of 1884, to

which reference has been made, will be found in the Appendix to this brief. The main questions upon which the decision of this case depends are, whether there is a conflict between funds dedicated in the two Acts to the respective bonds authorized by each, and whether this conflict constitutes such an impairment of the contract embodied in the earlier Act as to be within the inhibition of the Federal Constitution against the passage of laws impairing the obligation of contracts.

In its preamble, the object of the Act of 1882 is declared to be, to prevent further expensive and disastrous litigation between the City of New Orleans and the holders of its outstanding bonds, other than premium bonds, and to relieve the financial embarrassment of the City by inducing these bondholders to postpone the payment of their bonds and to fund their matured interest coupons, which had not been paid for several years, into bonds payable in ten years. This Act was passed in June, 1882, a few months after the decision of this Court in the case of Louisiana vs. Pilsbury, 105 U. S. 278. A reference to that decision will show how much was conceded by the bondholders who accepted this Act, and how great were the benefits which the City reaped from this concession. That decision condemned the City to raise an annual tax of $650.000 for the benefit of the holders of consolidated bonds. This sum was to be devoted, first, to pay the current interest of the year; secondly, to pay the arrearages of interest of former years; and thirdly, to the purchase of the bonds having the shortest interest to run.

By the operation of this Act of 1882, the City obtained relief from the burden of this immense tax and was enabled to retire her bonds at a more gradual and less oppressive rate. This was effected by inducing these bondholders to extend the time of payment of their bonds for forty years, to fund their matured coupons into bonds payable in ten years, and to agree to the provis-

ions contained in the Act for the retirement and cancellation of the extended, and ten-year bonds.

A number of bondholders, including the intervenor herein, accepted the offer made in this Act, extended the time of payment of their bonds for a period of forty years, and funded their matured coupons into ten-year bonds.

In consideration of this extension, the State and City agreed to devote certain funds and revenues exclusively to the payment of the extended and ten-year certificate bonds. These provisions for the payment of the bonds are contained in the 5th, 6th, and 7th Sections of the Act. They are:

1. The annual levy of a certain tax. Sec. 5 of the Act of 1882, p. 68.

2. The "City Debt Fund" All the funds in the hands of the Board of Liquidation of the City Debt at the time of the passage of the Act, *under existing laws,* were directed to be deposited to the credit of the City Debt Fund, which fund (not funds) was to be devoted to the payment of these bonds. Sec. 6 of the Act of 1882, p. 69.

3. The surplus proceeds of the premium bond tax of each year remaining in the hands of the Board of Liquidation, or surplus on hand at the time of the passage of this Act, after all the drawn series exigible or due to the holders thereof have been provided for, or fully paid. Sec. 7 of Act of 1882, p. 69.

The whole of this tax, however, mentioned in Sec. 5, is not paid to the holders of extended bonds.

The Act No. 58 of 1882 evidently contemplated the acceptance of the terms of the Act by all the holders of outstanding bonds. But a few days after the passage of this Act, the General Assembly passed Act No. 68 of 1882, p. 87 of the printed Acts of that year, to provide for the contingency, that all these bondholders might not accept the extension proposed in Act No. 58 of 1882. This Act No. 68 provided, that if but a portion accepted

the offer, then only a corresponding portion of the tax authorized in Act 58 should be levied. It also directed the levy of a tax for the benefit of unextended bonds; but delared that the requirements of the unextended bonds and the requirements of the other bonds, not extended, must be met by a tax not exceeding five mills, "it being the intention that not more than five mills shall be levied, under either or both Acts, for the benefit of the bonds of the City of New Orleans other than premium bonds." (See Sec. 6, Act 68 of 1882.) In other words, a tax of five mills is divided between the holders of extended bonds and the holders of the other bonds, in the proportion which the amount of bonds extended bears to the amount of bonds, other than premium bonds, which were not extended.

This five mill tax has not been sufficient to pay the interest on the extended and unextended bonds other than premium bonds. (Finding of Facts, Record, p. 13). Hence, the proportion of this tax to which the extended bonds are entitled is not sufficient to pay even the interest on these bonds.

Hence, if the funds and revenues mentioned above in (2) and (3) are applied to another purpose, not only will all hope of providing a sinking fund for extended and 10-year bonds be destroyed, but a default in the payment of their interest coupons will at once ensue.

We invite the Court's special attention to the fact that, in Sec. 3 of the Act of 1882, it is expressly declared that the extension contemplated in the Act shall not operate any novation of the bonded obligation, and shall not be deemed, in any manner, as altering, weakening or impairing the original contract obligations, or the rights and remedies of the holders thereof, under pre-existing laws or Constitutions.

What were some of the rights of these bondholders under laws prior to the Act of 1882, may be seen by reference to Sec. 11 of Act 31 of 1876, p. 57; Sec. 10 of the same Act, p. 56; 32 An. 918,

919, Board of Liquidation vs. City of New Orleans; 35 An. 140, 141, 142, Rivet vs. City of New Orleans; 105 U. S. 287, Louisiana vs. Pilsbury.

We shall have occasion, later on, to discuss these rights of the bondholders, which were in existence at the time of the passage of this Act of 1882.

The object of Act 67 of 1884 was to provide for judgments rendered and to be rendered against the City of New Orleans, for debts or claims created against the City, prior to the year 1879. It directed the Board of Liquidation to issue interest bearing bonds of the City, and to use the same in retiring and canceling the aforesaid judgment debt, either by the sale of the new bonds and appliance of the proceeds to pay judgments, or by exchange of bonds for judgments. The Act, then, was intended to provide for an entirely different class of creditors from the holders of outstanding bonds.

To the payment of the interest, and ultimately the principal, of these bonds, the Board of Liquidation were directed, by Secs. 3 and 4 of the Act, to apply:

1. All the property, real and personal, of the City, not dedicated to public use; and all assets of the City, realized and to be realized, not necessary for its support.

2. All uncollected revenues of the City prior to 1879, when collected.

3. After each allotment of series under the premium bond plan, that is, four times a year, $50,000 of the new bonds were to be exchanged for drawn premium bonds in the hands of the City.

The entire amount of uncollected revenues, prior to 1879, received to date by the Board of Liquidation, is only some $50,000. (See Findings of Facts, R. p. 13). As most of these back taxes are payable in "scrip" and never reach the hands of the Board of Liquidation, (see Louisiana State Constitution, Miscellaneous Ordinance for the Relief of Delinquent Taxpayers), this source of payment practically amounts to nothing.

We will now endeavor to show that the "City Debt Fund" pledged to the payment of the bonds of 1882, consists solely of "all the property, real and personal, of the City, not dedicated to public use, and all the assets of the City, realized and to be realized, not necessary for its support," which the Board of Liquidation is directed to devote to the bonds of 1884. And that the surplus proceeds of the premium bond tax of each year, pledged to the bonds of 1882, means, and can mean, nothing else than "the drawn premium bonds in the possession of the City" after each allotment of series, or the portion of the premium bond tax represented by these bonds.

We will first compare those sections of the two Acts which dispose of the property of the City not necessary for its administration and support.

Section 6 of Act of 1882 provides, "That all funds now, or that may be at the time of the passage of this Act, in the hands of the Board of Liquidation of the City Debt, under existing laws, shall be deposited with the Fiscal Agent of the Board to the credit of the account known as the City Debt Fund, which fund shall be applied exclusively to the purchase" of outstanding bonds or certificates issued and extended to be retired under this Act; "*provided* that said City Debt Fund shall be used first to provide for, and pay the interest on the bonds and certificates contemplated herein;"

Section 3, of Act 67 of 1884 provides, "That it shall be the duty of the City of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this Act, all property of the City of New Orleans, real and personal, not dedicated to public use, * * all assets of said City, realized and to be realized," except what is necessary for its administration and support, the same to be disposed of and proceeds applied: first, to the payment of the interest on the bonds authorized herein; second, to the redemption and cancellation of said bonds.

Section 6 of the Act of 1882, then, requires the Board of Liquidation to turn over the funds in its hands into the "City Debt Fund," and the whole "City Debt Fund" is to be applied as directed in the Act.

Now, what was the "City Debt Fund," as defined by existing laws?

The existing laws were Sec. 10 of Act 31 of 1876, Sec. 5 of Act 133 of 1880, and two decisions of the State Supreme Court, construing these Sections, found in 32 La. An. 915, Board, etc. vs. City, and 32 La. An. 268, Gas Light Co. vs. Mayor, etc.

The Board of Liquidation was created by Act No. 133 of 1880 to take charge of the bonded debt of the City of New Orleans. The City was directed to turn over to the Board all its property of every kind, not dedicated to public use, which was to be disposed of and sold by the Board; the proceeds of the sales were to constitute and be known as the "City Debt Fund," and to be used to retire and cancel the bonded debt of the City. Sec. 5 of Act No. 133 of 1880 enacts, "That it shall be the duty of the City authorities, as soon as possible, after the organization of the Board of Liquidation of the City Debt, to turn over and transfer to the said Board all the property of the City of New Orleans, both real and personal, not dedicated to public use, and the Board of Liquidation shall be and is hereby empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable; the proceeds of such sale or sales to be deposited with the fiscal agent of the Board at credit of "City Debt Fund."

The Supreme Court of Louisiana has twice been called on to construe this Section, with reference to the nature and extent of the property which the City was required to turn over to the Board of Liquidation to be converted into money and added to the "City Debt Fund." The Court held, that the Act covered not only property in existence at the date of its passage, but all prop-

erty and assets subsequently acquired by the City which were not dedicated to public use and not necessary for its administration and support.

The case of the Board of Liquidation vs. City of New Orleans, reported in 32 La. An. 915, was a suit between the Board and the City to determine which had the disposal of the right of way through several streets. The Court held, that the power of granting this right of way or *franchise*, is inherent in the City itself and not susceptible of transmission to the Board of Liquidation; but when the power has been exercised by the City, the result of it, the *franchise*, then becomes property, in the legal sense of the word, and the price, consideration, or proceeds of the same should, under the statutes, be transferred to the Board of Liquidation. The Court say (p. 918): "The exercise of such power, when consummated, can create property, which, when so engendered, forms part of the property, the nature and extent of which was in legislative contemplation when Acts 31 of 1876, and 133 of 1880 were framed and adopted. Considering the financial embarrassment of the City, and its inability to meet its bonded debt, the Legislature, *first* in 1876, placed a restraint upon the powers of of alienation of the City, to prevent it from disposing of any of its property susceptible of valid conveyance, and that body, in 1880, next determined and fixed the character of that property, when it enacted that the City authorities should transfer to the Board all the *real* and *personal* property of the City, not dedicated to public use, to be disposed of by that Board, with the restriction, however, that under the spirit and letter of those two laws, what proceeds may be realized, if any, shall be applied to the entire bonded debt of the City, whether evidenced by *premium* or *other* unfunded bonds. The language used in Section 10 of 1876 was intended *to comprehend not only property in esse, but also property in posse, of all and any description, not dedicated to public*

*use, accruing to the City of New Orleans, susceptible of alienation.*" (Italics ours).

The judgment of the Court (p. 919) decreed "that the injunction herein issued be made perpetual, to the extent of forbidding the City of New Orleans from carrying out Ordinance No. 6523, but without prejudice to the right of the City of disposing of the right of way in question in cash, or otherwise, the proceeds of such disposal, if any, to be deposited with the fiscal agent of the Board, at credit of "City Debt Fund," to be applied to the extinction of the bonded debt of the City, whether evidenced by *funded* or *unfunded* bonds of the City."

By funded bonds are meant premium bonds; by unfunded bonds are meant all other outstanding bonds of the City, for the benefit of which Act No. 58 of 1882 was passed. The intervenor is the owner of both classes of bonds.

This decision was in existence at the time Act No. 58 of 1882 was passed. That Act, then, pledged to the payment of extended and ten-year certificate bonds this "City Debt Fund," with the meaning which, by this decision, had been attached to it. This contemporary exposition of the meaning of the terms of the contract, entered into and formed a part of the contract, as if it had been embodied in it, and, right or wrong, so far as intervenor is concerned, it cannot be altered. Louisiana vs. Pilsbury, 105 U. S. 294.

It has been contended that Sec. 3 of the Act of 1882 includes merely the dollars and cents in the hands of the Board of Liquidation at the time of the passage of the Act. But by reference to that Section, the Court will see that it gives to the extended bonds not simply the *funds* in the hands of the Board at the date of the Act; it directs the Board to transfer these funds to the City Debt Fund, *which fund* the Act declares shall be exclusively applied, first, to the payment of the interest, and, ultimately, of the principal, of the extended and certificate bonds. The bondholders

who accepted and acted upon the offer made in this Act had a right to believe that this City Debt Fund was used with the meaning which had been judicially affixed to it in the case just quoted, that is, to include all the City's property, or the proceeds thereof, of any description, *in esse* or *in posse*, not dedicated to public use, accruing to the City of New Orleans. The holders of extended bonds have as inviolable a contract right to this interpretation of the "City Debt Fund," as they have to the fund itself. A reference to other portions of the Act of 1882 will show that the Legislature had no intention to use these words with a different or more restricted meaning. For, in Sec. 11 of the Act, the Board are forbidden, under severe penalties, from diverting any of "the funds, taxes, *assets or property*, designed in this Act to liquidate and pay said bonded debt, or the interest thereof, etc." (Italics ours.) Where has there been any designation in the Act of "assets or property," unless the "City Debt Fund" be given the meaning we contend for it?

The Court will observe, that in this case of the Board, etc. vs. City, 31 La. An. 915, decided before the passage of the Act of 1882, the highest Court of the State repeatedly declares that this "City Debt Fund" is applicable to the payment of the *bonded* debt of the City.

Giving to the "City Debt Fund" the meaning which had been attached to it when this Act was passed, and which other parts of the Act show it was intended to have, the conflict between the two Acts is apparent, by simple comparison. It will require little argument to show that this attempt to alter the destination of funds solemnly pledged to the holders of extended bonds, is sufficient to strike with constitutional nullity this Section 3 of Act 67 of 1884; but we will postpone the discussion of this part of the case until we have compared those Sections of the two Acts which dispose of the surplus of the premium bond tax.

Before discussing the disposition made of the surplus of the

premium bond tax, or the drawn premium bonds in the possession of the City, it will be necessary to examine some of the provisions of Act No. 31 of 1876, known as the "Premium Bond Act." This Act was passed upon by this Court in the case of Louisiana vs. Pilsbury, 105 U. S. 278, and the provision prohibiting the levy of any tax to pay other bonds other than premium bonds, was declared unconstitutional. Sweeping out of the Act the provisions which impaired the contract rights of bondholders who would not accept the proffered exchange, the validity of the Act, in all other respects, has been frequently adjudged by the Supreme Court of Louisiana. In a recent case, 35 La. An. 140, Rivet et al., vs. City et al., the Supreme Court of Louisiana had occasion to analyze and discuss the provisions of the Premium Bond Act and to determine its scope and meaning. We desire to refer the Court to that decision for a fuller analysis and explanation of the Act than we deem it necessary to give in this brief.

At the time of the passage of the Act of 1876, the City's finances were in a deplorable condition. The City was overwhelmingly in debt, and the taxation necessary to pay this indebtedness threatened her with financial ruin and bankruptcy. To postpone the time of payment of her bonded debt and to liquidate it at a more gradual rate than permitted by the original bond contracts, the scheme contained in the Premium Bond Act was devised. It was the purpose of the Act to fund the entire bonded debt of the City of New Orleans into bonds to be issued under the provisions of the Act, by inducing the holders of outstanding bonds to exchange them for bonds of $20 each, payable, a certain increasing number, every year. What bonds should be paid each year was to be determined by quarterly drawings from a wheel, into which would be placed the numbers of the whole series of bonds provided for in the Act. A certain amount of premiums were to be distributed after each drawing to the holders of drawn bonds, and hence the bonds were called " Pre-

mium Bonds." (See Pilsbury Case, 105 U. S, p. 299.) Twenty million dollars of bonds, or one million in number, were deemed necessary for the purposes of the Act. The Act contemplated the contingency that all the holders of old bonds would not be willing to exchange them for premium bonds, and that, therefore, the whole $20,000,000 of bonds would not be issued. It was provided, however (see the Rivet case, 35 La. An. 141), that the entire series should be regarded as issued, the numbers corresponding to the one million bonds should be placed in the wheel, and the allotment of series and drawing should be conducted as if the whole $20,000,000 of bonds had been given out in exchange for the old bonds. The City was to hold these unissued bonds, and they would represent the unfunded bonded bebt. The City was directed to devote the portion coming to her at each drawing, as the holder or representative of these unissued bonds, to the retirement of the outstanding unfunded bonds, of which the extended bonds of the intervenor are a part. Only about $13,000,000 of premium bonds were issued and taken in exchange for old bonds. The remaining $7,000,000 were never issued. After the issuance of the bonds, the City bought in $3,500,000 of the bonds. So that the present number of premium bonds issued, not issued, and bought in after issuance and now owned by the City, are (see Finding of Facts, p. 12):

Premium bonds issued and outstanding ..... $7,918,280 00
Premium bonds issued and held or represented by the City ..... 6,736.700 00
Premium bonds bought in by the City and held by her ..... 3,567,360 00

The numbers corresponding to these bonds in the hands of the City go into the wheel and are concerned in every drawing, for it is an essential part of the premium bond plan, that the whole series of $20,000,000 should be regarded as issued, so that all shall not be withdrawn and cancelled before the end of fifty

years, as originally contemplated in the Act. There are now four drawings in the year (Rivet case, 35 La. An. 144), each drawing being followed by a distribution of premiums among the holders of drawn numbers.

When, then, at the quarterly drawings, any of the drawn numbers correspond to the numbers of unissued bonds, or those bought in by the City, then the City may be said to be the holder of so many "drawn bonds." These are the bonds which are referred to in the Act of 1884 as "drawn premium bonds in the possession of the City."

But, drawn premium bonds held or represented by the City are not paid. Hence arises "the surplus proceeds of the premium bond tax." The trial Judge found the facts on this subject to be (Record, pp. 13, 14), "that the sum required to carry out in its integrity the premium bond plan, considering all the bonds as issued and in the hands of other persons than the City of New Orleans, has never, except for the years 1876 and 1877, been produced by the premium bond tax:

| | |
|---|---|
| The premium bond plan required for the year 1883 | $682,754 00 |
| The total 5 mill premium bond tax levied in 1883 | 565,455 00 |
| Difference | $117,299 00 |
| Premium bond plan required for 1884 | $703,750 00 |
| Five mill tax levied in 1884 | 573,144 00 |
| Difference | $130,606 00 |

The deficit in 1883 and 1884 did not become apparent, because of the fact that the funds corresponding to the drawn premium bonds held by the City, remained in the hands of the City, and had not to be paid out. That the amount furnished by the premium bond plan was never adequate, except for the years 1876 and 1877, to carry out the premium bond plan, if all the the premium bonds had been issued; hence, the surplus of the premium bond plan represents no surplus tax over and above the amount

required to carry out the plan in its integrity, and thus pay the outstanding premium bonds and the sum or sums which accrue to the City as the holder or representative of drawn premium bonds, either not issued or bought in by her. If the premium bonds covered by the plan and now represented by the City, were issued to outsiders, there would be an annual deficit in the premium bond plan itself."

We are now prepared to compare the provisions of the two Acts which deal with funds to be derived from the premium bond tax.

Sec. 7 of the Act of 1882 provides, "That the surplus proceeds, if any, of the premium bond tax of each year remaining in the hands of the Board of Liquidation of the City Debt, or surplus on hand at the time of the passage of this Act, after all the drawn series, interest and premiums thereon, exigible or due to the holders thereof, have been provided for or fully paid, shall also be deposited with the Fiscal Agent of the said Board to the credit of the account known as the City Debt Fund, and applied exclusively as provided in Section 5."

Sec. 5 provided for payment of principal and interest of bonds extended and issued under this Act.

Sec. 4 of the Act of 1884 provides, "That for the further redemption of said bonds, the said Board of Liquidation is hereby authorized and required, after each and every allotment of series following the passage of this Act, to advertise for sealed proposals for the exchange of drawn premium bonds in possession of the City for the bonds authorized herein to the amount of fifty thousand dollars, of said bonds issued under this Act."

As there are four allotments in each year, this fund would redeem annually $200,000 of the new bonds.

We contend, that to give to the judgment and floating debt credi-

tors the drawn premium bonds in the possession of the City, practically means nothing else than to give them the surplus proceeds of the premium bond tax, which Sec. 7 of the Act of 1882 dedicates to the payment of extended bonds of the character owned by the intervenor.

That this view is correct is shown by the figures and facts found by the trial Judge, a part of which we have quoted above, and to the whole of which we invite the special attention of the the Court. (See Record, pp. 12-13)

The workings of the premium bond plan, as revealed by these statements, show that drawn premium bonds in the hands of the City are never paid out of the premium bond tax, but that those which had been bought are cancelled and those unissued remain unissued, while the funds corresponding to those bonds remain in the premium bond tax fund and constitute the surplus out of which, in accordance with Sec. 11 of Act 31 of 1876, and Sec. 7 of the Act of 1882, the coupons of outstanding bonds are paid. If the drawn premium bonds represented as held by the City are sold and presented for payment by the purchasers, not only will the surplus of the premium bond tax at once disappear, but the tax will be inadequate to pay the drawn premium bonds of those who funded their old bonds in accordance with the Act of 1876. The lower court found (Record, p. 13) "that the coupon tax, other than premium bonds collected to date for the year 1883, amounted to $335,035.01. That the coupons payable and paid in the year 1883, were $496,029.70. Difference, $160,994.69. That this difference was paid by money remaining in the debt fund principally consequent on drawn premium bonds represented or held by the City. That the coupon tax collected to date for the year 1884 was $429,155.38. Coupons payable in 1884, $496,029.70. Difference, $66,874.32, which difference was made up by the money due the drawn premium bonds represented or held by the City."

Hence, if the provisions of the Act of 1884 are permitted to be

carried out, a default will be made in the payment of the interest on all the outstanding bonds of the City, and all hope of a sinking fund for their redemption will be destroyed. Not only this, but a deficit in the funds to pay drawn premium bonds will be created, the premium bond plan broken up, and the City relegated to the financial chaos from which she has just emerged with so much difficulty. Fortunately, the existence of that principle in our Constitution which secures the inviolability of contracts affords a means of averting the deplorable consequences of this unwise and iniquitous piece of legislation.

Our contention finds abundant support in the Premium Bond Act itself. A careful perusal of the Act impresses the mind with the conviction that the Legislature intended the holders of outstanding bonds to receive all the premium bond tax which was not necessary to pay that portion of the issued premium bonds which were to be retired each year under the allotment plan. (See Secs. 5 and 11 of Act 31 of 1876.)

Under the premim bond scheme, all outstanding bonds were to be regarded as funded, the unissued premium bonds remaining in the hands of the City being supposed to represent outstanding bonds which had not been presented for funding. The tax, therefore, was levied as if the whole $20,000,000 of bonds were issued; but the surplus resulting each year from the fact of some of the drawn series being in the possession of the City, was to go to the outstanding unfunded bonds. In other words, the unissued premium bonds of the City represented unfunded bonds, and any part of the tax to which the premium bonds held by the City were entitled, was to be turned over to the unfunded bonds.

If, as must be contended by those who see no conflict between Sec. 7 of 1882 and Sec. 4 of 1884, the drawn premium bonds in the possession of the City are all to be fully paid before there can exist any surplus in the premium bond tax, and the unissued premium bonds and those bought in by the City, constitute so

much revenue or property in her hands which she need not apply to her bonded debt, but may employ as she sees fit, or as the Legislature may direct, then it must be believed that the Legislature, in passing the Act of 1876, while deploring the overwhelming indebtedness of the City, and the consequent financial ruin which threatened her, intended, nevertheless, to create a *new debt* of several millions, by giving to the City to dispose of, as she chose, all the premium bonds that were not exchanged for old bonds!

We might rest content with calling the attention of the Court to the absurdity, in view of the circumstances under which the Premium Bond Act was passed, and of the then financial condition of the City, of imputing such an intention to the Legislature. But it can be easily shown that such an interpretation would make the Act inconsistent with itself, and in violation of the Constitution of 1868, which prevailed in Louisiana at the date of its passage.

For, if we regard the premium bonds which were not issued as not representing the unfunded bonds, but as so much property in the hands of the City which, as they are drawn, she can cash herself, or sell them to others to be cashed, out of the tax required by the Act to be annually levied, and apply the proceeds as she or the Legislature chooses, then it necessarily follows that a new debt was created by the Act of 1876, equal in amount to the number of premium bonds which were not issued, that is, to about $7,000,000. But the Act itself forbade the creation of any new debt on the part of the City, and declared that the limit of the City debt to the amount she then owed was an essential part of the contract with the premium bondholders. Sec. 6 of the Act thus concludes: "It being a part of the consideration of this contract that the City of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the Constitution of this State, until the final payment and extinction of the premium bonds aforesaid."

The provision of the Constitution referred to, is found in the Acts of 1874, p 56, being an amendment to the Constitution of 1868. "The City of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for payment of money shall be issued by any officer of said City, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds; provided, the City debt be not thereby increased."

Section 4 of the Act of 1884, therefore, is not only an unconstitutional diversion of a fund previously pledged to another set of creditors, but it can be carried out only by giving to Act 31 of 1876 a construction which makes it inconsistent with itself, and violative of the State Constitution.

Our claim to the surplus proceeds of the premium bond tax, or the sums accruing to the City, as the holder of drawn premium bonds, which we have endeavored to establish by an examination of the Premium Bond Act and its practical operation, has been recognized in so many words by the Supreme Court of Louisiana in the Rivet case. The Court held that the holders of unfunded bonds (extended bonds of intervenor are unfunded) were entitled to the funds accruing to the City, as the holder of the premium bonds unissued or bought in by her. Speaking of the advantages of the premium bond scheme, the Court say (35 La. An. 140): "Even of the diminished tax so levied, more than three-fifths is returned directly to the City, to be used, under the provisions of the Act, for the reduction of her bonded debt." Again, on p. 142, we find: "Under the law as it exists, the City is required to invest the part coming to her in retiring unfunded bonds."

Hence, even before the passage of Act No. 58 of 1882, the holders of bonds of the character owned by the intervenor were en-

titled to all of the premium bond tax not required to pay the issued premium bonds drawn each year; and Sec. 7 of the Act of 1882 is not much more than the recognition, in a solemn and binding contract for a valuable consideration, of a pre-existing right.

We submit that we have shown that Sec. 4 of the Act of 1884, is but a thinly disguised attempt to deprive the extended bondholders of a fund previously dedicated to them, and to apply it, under a different name, to another class of creditors.

This Act of 1884, if permitted to be carried out, will seriously interfere, also, with the vested rights of the holders of premium bonds. The premium bond tax is not sufficient to pay the outstanding bonds, and the sums which accrue to the City as the holder or representative of bonds either not issued or bought in by her. If the premium bonds covered by the plan and now represented by the City are issued to outsiders, as is contemplated by Sec. 4 of the Act of 1884, there will be an annual deficit in the premium bond plan itself. (Record, p. 14 ). The Act of 1884 requires, that that after each drawing of premium bonds (there are now four drawings each year, see Rivet case, p. 144), enough drawn premium bonds shall be exchanged to retire $50,000 of the new bonds; that is, $200,000 of the bonds of 1884 are to be retired each year, by exchanging and transferring to outsiders an equivalent amount of drawn premium bonds in the possesion of the City. A simple inspection of the figures and facts found by the trial Judge, (Record, pp. 134) will show that the payment of these drawn premium bonds, given in exchange for the bonds of 1884, will render the premium bond tax inadequate to pay the drawn premium bonds which were regularly issued. In the Rivet case, the Supreme Court of Louisiana decided that the levying of the premium bond tax for the benefit of the premium bonds was "the gist and marrow of the entire proposition embodied in the

Act," and that the tax was an essential part of the premium bond contract (35 La. An. pp. 138–140). We submit that the diversion of the lion's share of this tax to the payment of the judgment and floating debt, through an unauthorized use of the drawn premium bonds in the possession of the City, is a flagrant violation of the contract rights of those who funded their old bonds into premium bonds.

We have endeavored above to show that the disposition of the drawn premium bonds in the hands of the City, proposed in the Act of 1884, is based on the assumption that the Legislature intended, by Act 31 of 1876, to increase the debt of the City by an amount equal to the premium bonds which were not used to fund the then outstanding bonds of the City; and that such a construction of the Act of 1876 would make it self-contradictory and unconstitutional. To force such a construction on the Act now, would violate the contract rights of premium bondholders; for the stipulation contained in Sec. 6 of Act of 1876, above quoted, against any increase of the City's debt until the payment of the premium bonds, was manifestly a material part of the consideration which induced the holders of the then outstanding bonds of the City to fund them into premium bonds.

Intervenor is the owner of $30,000 of premium bonds (see petition of intervention, Record, p. 6), and is, therefore, entitled to ask that this Sec 4, of Act 67 of 1884, be declared unconstitutional on account of its impairment of the obligation of the contract contained in the Premium Bond Act, as well as on account of its violation of the dedication made in the Act of 1882.

Having endeavored to show that the provisions for the payment of the bonds of 1884 conflict with the provisions previously made in the Act of 1882, for the payment of the bonds extended to be retired under that Act, it now remains to determine whether the Act of 1882 embodied a contract, whether the dedication of funds contained in Secs. 6 and 7 of the Act was a material part

of this contract, and whether the diversion of these funds to other purposes by the Act of 1884, constitutes such an impairment of this contract as to render the Act of 1884 unconstitutional.

That Act No. 58 of 1882 is, in its nature, a contract between the City of New Orleans and the bondholders, when the latter accepted its terms and manifested their acceptance by extending their bonds and exchanging their coupons, matured and exigible, for ten-year certificate bonds, will scarcely be denied. There was a proposition on the part of the State and City, an acceptance on the part of the bondholders. The parties thereby entered into mutual engagements, and a synallagmatic contract was formed.

If any doubt, however, as to the nature of this transaction can exist, it is removed by Section 10 of the Act, which reads as follows:

"SEC. 10. *Be it further enacted, etc.*, That this Act, in all its parts, provisions, terms, conditions, obligations and limitations, is to be deemed and to constitute a valid, binding contract between the State of Louisiana, the City of New Orleans, its residents, citizens, and taxpayers, and the holders of the bonds herein authorized to be extended, and the judicial process of the State of Louisiana, now authorized by law, or in force at the creation of said bonded debt as aforesaid, may be resorted to, and is to be recognized and applied to the Judges thereof, for the enforcement of its provisions in favor of any party having and showing just cause for complaint or injury, or a violation of any of the provisions thereof."

It is equally clear that an essential, material part of the contract embodied in the Act is the provision made for the payment of the bonds therein authorized to be extended. The bondholders who accepted the offer made in the Act agreed to extend the time of payment of their bonds for forty years, and agreed to fund their matured coupons into City certificate bonds, payable in ten years. The State and City, on the other hand, agreed to

provide for the payment of the principal and interest of the extended bonds and ten-year certificate bonds, as directed by the 5th, 6th and 7th Sections of the Act. These provisions for the payment of the bonds were obviously introduced to induce bondholders to consent to the extension. They were intended to give and did give the extended bonds a market value, and *bona fide* holders have acquired them on the faith of the privileges and securities guaranteed them in this Act by the State acting for its creature, the City of New Orleans. These provisions, therefore, enter into and form a part of the contract, and are not subject to legislative impairment or repeal.

As stated in the beginning of our brief, this suit was instituted for the purpose of mandamusing the Board of Liquidation to issue bonds to be exchanged for judgments, as provided in Act No. 67 of 1884, and to devote to their payment drawn premium bonds in the possession of the City, and all the property, real and personal, of the City not dedicated to public use.

If we have succeeded in showing that these funds and resources of the City are identical with those funds which had been previously pledged and dedicated by Act No. 58 of 1882 to the payment of bonds of the character owned by intervenor, and in which, therefore, the holders of these bonds have a vested right, it follows, without necessity for argument or citation of authorities, that the judgment of the lower court should be reversed and the relator's prayer for a mandamus ordering the Board of Liquidation to disregard the Act of 1882 and dispose of these pledged funds and resources, as directed by the Act of 1884, should be rejected.

The most valuable fund in dispute is the surplus proceeds of the premium bond tax, or the drawn premium bonds in the possession of the City after each drawing. If we have failed to convince the Court that intervenor's rights to this fund, as the holder of extended unfunded bonds—rights which were created by the same

Act which called into being the premium bond tax, and which were recognized and renewed, for a valuable consideration, in the contract contained in the Act of 1882—entitle us to resist the diversion of the fund proposed in the Act of 1884, then, as a holder of premium bonds, we can fall back on our rights under the Premium Bond Act and claim the protection of the Court against the threatened violation of this premium bond contract. We believe we have already shown that the rights of premium bondholders will be seriously impaired if the provisions of Sec. 4 of the Act of 1884 are carried out. That part of the premium bond contract against an increase of the City's debt will be violated, and so much of the premium bond tax will be diverted to purposes not contemplated in the Act as to leave an insufficient amount to carry out the premium bond plan. We confidently ask, therefore, that at least that part of the judgment which orders the Board of Liquidation to carry into execution the provisions of Sec. 4 of Act 67 of 1884 be reversed, and that relator's prayer for a mandamus should be rejected, at least quoad the premium bond fund.

If we strike out of the Act of 1884 the provisions which conflict with the Premium Bond Act and the extended bond Act, the only means left for the payment of the bonds sought to be authorized by the Act are the uncollected revenues prior to 1879. As we have seen above, these revenues practically amount to nothing.

Will the Court order the issuance of these bonds after declaring the provision for their payment to be null and void? Mr. Cooley, in his work on Constitutional Limitations, in discussing the subject of when statutes unconstitutional in part should be allowed any effect, says (pp. 215, 216): "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which

was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. *But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion.*" (Italics ours). Can it be supposed that the legislative intent expressed in Act 67 of 1884 can be carried out with only a trifling sum with which to pay the bonds (R. p. 13) and no prospect of increasing these means of payment?

We submit, then, that in accordance with the principle of statutory construction just quoted, and to avert the great wrong which would be inflicted upon the innocent purchasers of bonds apparently on their face provided with sufficient means of payment, yet in reality worthless, the Court should decline to compel the Board of Liquidation to issue any bonds under the Act of 1881.

We, therefore, respectfully ask that the judgment of the lower court be reversed, and relator's prayer for a mandamus rejected.

LEOVY & LEOVY,
E. D. WHITE,
J. P. BLAIR,

*Counsel for the Sun Mutual Insurance Co., Plaintiff in Error.*

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ASSIGNMENT OF ERRORS.

The Court erred:

1. In holding, as a matter of law, that relator was entitled to a mandamus directing the issuance of bonds as prayed for.

2. In holding, as a matter of law, notwithstanding the state of facts found, that relator was entitled to a mandamus directing

the Board of Liquidation to apply the "City Debt Fund" to the extent required by Act 67 of 1884, to the payment of said bonds.

3. In refusing to conclude, as a matter of law, from the state of facts found, that the surplus of the drawn premium bonds was dedicated entirely to the bonds of the character owned by intervenor, and, therefore, that the provision of the Act of 1884 was unconstitutional, null and void, because it impaired the obligation of intervenor's contract.

4. In failing to hold, as a matter of law, from the state of facts found, that the drawn premium bonds held by the City, and not already issued in exchange for outstanding bonds, constituted a part and parcel of the surplus of the premium bond tax, and that said surplus, so constituted, was exclusively dedicated to the bonded debt of said City, exclusive of the bonds claimed by relator.

# APPENDIX.

## *ACT No. 58 OF 1882.*

No. 58.] AN ACT

Entitled an Act to authorize the City of New Orleans to renew and extend payment of her outstanding bonds, other than Premium Bonds, to provide the rate of interest on the bonds as renewed or extended, and authorize the levy of a tax to pay the same.

*Whereas*, under this Article 48 of the Constitution notice of intention to apply for the passage of this Act has been duly published in the City of New Orleans, for thirty days as required; and

*Whereas*, the present financial embarrassment of the City of New Orleans threatens further to depreciate the value of property, to increase the sum of its indebtedness and to impair good government of its affairs, and whereas, litigation has hitherto resulted disastrously for the taxpayer, and whereas, the public creditors of said City of New Orleans have indicated a desire to settle their claims equitably and to postpone the payment of certain bonds in order to lighten the burden of taxation, and whereas, the Constitution contemplates a definite termination of the corporation's embarrassment by special legislative enactment,

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That the City of New Orleans, acting through the Board of Liquidation of the City Debt, or other duly authorized officers, be and she is hereby authorized and empowered to extend the bonded indebtedness of said City, other than Premium Bonds, outstanding at the passage and promulgation of this Act, for the period of forty years, from January 1, 1883, at a rate of

interest not exceeding six per cent.; *provided*, the City shall have the right to call in said bonds, so renewed or extended for payment, at par after the year 1895, upon giving notice to that effect during a period of three months.

SEC. 2. *Be it further enacted, etc.*, That the provisions of the foregoing Section be and they are hereby extended to all bonded obligations of the City, except Premium Bonds, whether due or to become due, including such as may have been merged into judgments, but for which no tax, special or otherwise, has yet been levied; *provided*, nothing in this Act shall be considered as a waiver of prescription which may have accrued or may accrue on such bonds in favor of the City.

SEC. 3. *Be it further enacted, etc.*, That, to each bond extended or renewed, a certificate or annex, signed by the Mayor and the Administrator of Finance or Treasurer of said City, shall be securely affixed, which certificate, in express terms, shall import an obligation on the part of the City to pay the principal of said extended bond in forty years from a date not later than the first of July, 1883, with interest as aforesaid; and said certificate shall fully and accurately describe the bond to which it is affixed, and the coupons of interest thereon not yet matured, and shall be of no effect unless accompanied by said bond, which shall be stamped to correspond with the number and description of the certificate, and accurate registry shall be kept, recording both bond and certificate; and if the bonds to be renewed have been merged in judgment, a certificate a full satisfaction and renunciation of all rights under the judgment shall be attached, and the judgment cancelled and annulled in the records of the Court, and on the books of the Department of Accounts or Comptroller, if it has been registered under Act 5 of 1870. Coupons of interest, payable at the rate of three per cent. semi-annually, shall be attached to and delivered with said certificate, and shall relate to the dates of maturity of the coupons on the

extended bonds, begining with the earliest coupon maturing after January 1, 1883, and continuing during the period of forty years; *provided*, that no bonds shall extended unless all the unmatured coupons falling due after January 1, 1883, are attached thereto; and, *provided further*, that the coupons of the extended bond shall be surrendered, with the corresponding coupons of the certificate, when the latter coupons are paid. The said certificates shall be numbered in the order of the applications therefor, and when called in for payment under the operation of the City's option, the last and highest numbers shall be called first and interest thereon shall cease at maturity of said call. The said extension, during its continuance, shall interrupt all prescription of every kind on said bonds or coupons, and shall not operate any novation thereof, nor shall it be deemed in any manner as altering, weakening or impairing the original contract obligations aforesaid, or the rights and remedies of the holders thereof, under pre-existing laws or constitutions, so that in case of default or non-payment at any time, after due demand of the interest stipulated and agreed upon, or of failure to pay the principal thereof when due, then, in that case, the extension of time granted for the payment of the principal of said bonds, and the interest shall, *ipso facto*, be null and void and of no effect, and the holder or holders of said bonds shall be restored to all his or their original rights and remedies, and be entitled to claim and enforce payment of interest at the time and rates originally stipulated, and payment of the principal at maturity, in accordance with, and under the laws by which said bonds were originally issued and enforced at the time of their creation, as if no extension had ever been stipulated or agreed upon, as herein provided.

SEC. 4. *Be it further enacted, etc.*, That in order to provide for the payment of matured coupons of outstanding bonds, up to and including January 1, 1883, for which no tax has been levied, the City of New Orleans, acting through the said Board of Liq-

uidation of the City Debt, be and is hereby empowered and instructed to deliver to the holder of any valid coupons issued by the said City of New Orleans, matured or to fall due prior to January 2, 1883, and for which no judgment tax shall have been levied, a certificate importing an obligation to pay the sum of the face of said coupons and the interest thereon, at the rate of six per cent. per annum, from maturity thereof until Jan. 1, 1883. Said certificate shall be dated Jan. 1, 1883, and be payable in ten years from date or sooner, at the option of the said City; it shall accurately describe the coupon or coupons in exchange for which it is to be delivered, and said coupons shall first be deposited for safe keeping with the said Board of Liquidation, and an accurate registry shall be made by said Board of both the coupons and the corresponding certificates. The said registry shall carefully note the date and number of each deposit of coupons, as aforesaid, in the order of deposit, and the corresponding certificates shall be numbered successively in the same order, and without regard to the time of actual issue. The option of redemption reserved to the City, shall begin on January 1, 1884, the last and highest numbers of the certificate being first redeemed, and all to be redeemed successively in the same order. One month's public notice shall be given by said City of the amount and numbers of the certificates it will be cause to be redeemed. The said certificates shall bear interest at the rate of three per cent. semi-annually, until paid, to be represented by coupons attached to and numbered identically with said certificates; *provided*, that said interest shall cease upon any certificate one month after notice, as aforesaid, shall have been published, that the certificate will be paid. Said certificate shall be negotiable and transferrable by delivery only without endorsement, and shall invest the holder thereof with all the rights, remedies and privileges of the original holders of the coupons in exchange for which they were issued; and, in case

of non-payment of either the interest or principal of said certificates punctually when due, the holder may immediately, without further process of law, recover from the City the coupons originally deposited as aforesaid, and may thereupon proceed against the City under the original bond contract, without the operation of any prescription or novation, and as is provided in Sec. 1 of this Act, in the case of the extension of outstanding bonds.

SEC. 5. *Be it further enacted, etc.*, That in view of the enforcement by judicial process of the payment of past due bonds and coupons, with interest and costs, the City of New Orleans is hereby authorized and directed, in order to provide for the punctual payment of the interest and principal of all outstanding bonds and certificates for matured coupons extended, as provided in Section 3, except Premium Bonds, to levy on all property within its territorial limits, liable to taxation for other purposes, at the same time and in the same way and on the same tax bill, and to be enforced and collected as are the ordinary City taxes, an annual tax sufficient to pay punctually the interest on all outstanding bonds and extended coupons, as aforesaid, when due, which said tax shall never exceed one-half of one per cent., nor be less than one-quarter of one per cent., on the assessed valuation of all taxable property as aforesaid, and the proceeds of said tax shall be duly turned over, as collected, to the Board of Liquidation of the City Debt, in the same manner as the Premium Bond tax, to be by them deposited to the credit of the City Debt Fund, and to be applied exclusively to the objects and purposes of this Act.

SEC. 6. *Be it further enacted, etc.*, That all funds now, or that may be at the passage of this Act, in the hands of the Board of Liquidation of the City Debt, under existing laws, shall be deposited with the Fiscal Agent of the Board to the credit of the account known as the City Debt Fund, which fund shall be

applied exclusively to the purchase, on the most favorable terms, not exceeding par of the face value of any of the outstanding bonds or coupons, and the certificates therefor of said City, which are extended to be retired under the provision of this Act; *provided*, that said City Debt Fund shall be used first to provide for, and pay the interest on the bonds and certificates contemplated herein; and it shall be the duty of the Council, in its annual appropriation, to carry out the provisions of this Act.

SEC. 7. *Be it further enacted, etc.*, That the surplus proceeds, if any, of the Premium Bond tax of each year, remaining in the hands of the Board of Liquidation of the City Debt, or surplus on hand at the time of the passage of this Act, after all the drawn series, interest and premiums thereon, exigible or due to the holders thereof, have been provided for or fully paid, shall also be deposited with the Fiscal Agent of the said Board to the credit of the account known as the City Debt Fund, and applied exclusively as provided in Section 5.

SEC. 8. *Be it further enacted, etc.*, That the said Board of Liquidation shall render semi-annually to the Mayor of the City of New Orleans, for publication, a full statement of its operation during the previous six months, and give a detailed statement of all property and moneys received and disbursed, or disposed of within said period, and the purposes thereof.

SEC. 9. *Be it further enacted, etc.*, That the City of New Orleans is hereby authorized, and it shall be its duty, to pass all necessary and proper ordinances, and to execute and to sign all Acts necessary to carry out the provisions of this Act in relation to the settlement, adjustment and extension of the bonded debt aforesaid, as contemplated herein with the holders thereof, as herein described and designated, and to prepare and to perfect the certificates and coupons required, and otherwise to do and perform what is required and directed.

SEC. 10. *Be it further enacted, etc.*, That this Act in all its parts, provisions, terms, conditions, obligations and limitations, is to be deemed and to constitute a valid, binding contract, between the State of Louisiana, and the City of New Orleans, its residents, citizens and taxpayers, and holders of the bonds herein authorized to be extended, and the judicial process of the State of Louisiana, now authorized by law or in force at the creation of said bonded debt as aforesaid, may be resorted to, and is to be recognized and applied to the Judges thereof, for the enforcement of its provisions in favor of any party having and showing just cause for complaint or injury, or a violation of any of the provisions thereof.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made a felony, punishable with a fine not exceeding $5,000, and imprisonment at hard labor not exceeding five years, for the fiscal agent, the Mayor, or any other officer of the City of New Orleans, or of its clerks, or subordinates, or employees of any description whatever, to feloniously misapply, misappropriate or embezzle any of the funds, taxes, assets, or property designed in this Act to liquidate and pay said bonded debt, or the interest thereof, or to divert the same, or any part thereof, from the legitimate use and purpose herein provided, and such person or persons, on conviction thereof, according to law, shall be punished accordingly.

SEC. 12. *Be it further enacted, etc.*, That any legal proceeding instituted to prevent, hinder, delay or obstruct the operation of this Act, or any of its provisions, in whole or in part, after its promulgation as a law, shall be tried summarily, and by preference over all other causes or proceeding, whether the court having jurisdiction be in vacation or not; and, if appealed to the Supreme Court of the State of Louisiana, it shall be tried and determined by preference, whether said Court be in regular ses-

sion or in vacation; and, it is hereby made the duty of the Judges thereof, if in vacation, to determine the controversy within the least delay, and the decree pronounced shall become final on the twentieth day thereafter, unless a rehearing be granted, in which latter event the cause shall be heard *de novo*, and determined by said Court, and the decree pronounced thereon shall become final then without further delay.

SEC. 13. *Be it further enacted, etc.*, That this act shall take effect from and after its passage, and all laws or parts of laws inconsistent or in conflict herewith be, and the same are hereby repealed.

R. N. OGDEN,
Speaker of the House of Representatives.
GEO. L. WALTON,
President *pro tem.* of the Senate.

Approved June 30th, 1882.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

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*ACT No. 67 OF 1884.*

No. 67.] AN ACT

To amend and re-enact Sections 2, 3 and 5, of an Act entitled "An Act to liquidate the indebtedness of the City of New Orleans, and to apply its assets to the satisfaction thereof; to create a Board of Liquidation, and prescribe their duties; and to provide for a fiscal agent, and for the levying of a sufficient tax to pay said interest;" approved April 10, 1880;

and to further provide for the redemption of the bonds authorized herein, the payment of the interest on the same, when said tax is not levied; and for the disposition and sale of said assets and other property.

*Whereas*, due notice of the introduction of this Act has been given in accordance with Article 48 of the Constitution; and

*Whereas*, the legislation heretofore enacted, under Article 254 of the Constitution of the State, providing for the liquidation of the indebtedness of the City of New Orleans, has in part proved inoperative;

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That Section 2, of Act 133, approved April 10, 1880, be amended and re-enacted so as to read: That the Commissioners of the Consolidated Debt, or the City officers, provided and named in Section 1 of this Act, and the syndicate hereby created, shall constitute a Board of Liquidation of the City Debt, and the said Board shall have exclusive control and direction of all matters relating to the judgment and bonded debt of the City of New Orleans. The Board of Liquidation shall cause to be prepared bonds of the City of New Orleans, which bonds shall only be used for the purpose of negotiation or exchange, as hereinafter provided. The said bonds shall be signed by the Mayor and Treasurer of the City of New Orleans, and countersigned by the Comptroller of said City; they shall be dated June 1, 1884, and be made payable in fifty years from said date, or sooner, at the option of the City, and bear interest at the rate of five per cent. per annum, from the date of said bonds, payable semi-annually, on the first days of June and December of each year; said interest to be represented by one hundred conpons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the Board of Liquidation, and be made payable at such place or

places as may be designated in the bond, but the said bonds shall be made payable, interest and principal, in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.*, That Section 3, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the said Board of Liquidation of the City Debt, be and it is hereby authorized and required, and it is made the duty of the said Board, to retire and cancel the entire debt of the City of New Orleans, now in the form of executory judgments and registered under the provisions of Act No. 5 of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879, and subsequent years; that it is the full intent and meaning of this Act to apply solely the privileges thereof to executory judgments, at present rendered against such City, and to such floating debt or claims against said City for 1878, and previous years, merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and canceling said judgment debt, the said Board is authorized and required either to sell the bonds to be issued under this Act at not less than their par value, and apply the proceeds thereof to the payment of said judgments, as above specified, or issue said bonds in exchange for said judgments.

SEC. 3. *Be it further enacted, etc.*, That Section 5, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as read: That it shall be the duty of the City of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this Act, all property of the City of New Orleans, real and personal, not dedicated to public use; *provided*, that in the sale of batture property, which is herein included, the

right of the City to all future accretions shall be reserved, all assets of said City realized and to be realized, except such assets and revenues as pertain to the administration of said City, and necessary for the support of the same, as at present authorized, all uncollected revenues of said City anterior to the year 1879, when collected; and the said Board is hereby authorized and required to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said Board may deem to be for the best interests of the City, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected: *first*, to the payment of the interest on the bonds authorized herein in the event that the tax authorized by Section 11 of said Act No. 133, approved April 10, 1880, be not levied; *second*, to the redemption and cancellation of the said bonds; *provided*, that bids for the sale of the same shall be by sealed proposals, and that preference shall be given to the lowest bidder; and, *provided further*, that no bids above the par value of said bonds shall be accepted.

SEC. 4. *Be it further enacted, etc.*, That for the further redemption of said bonds, the Board of Liquidation is hereby authorized and required, after each and every allotment of series following the passage of this Act, to advertise for sealed proposals for the exchange of drawn premium bonds in the possession of the City for the bonds, authorized herein, to the amount of fifty thousand dollars of said bonds issued under this Act; *provided*, that no exchange be made unless preference be given to the lowest bidder.

SEC. 5. *Be it further enacted, etc.*, That nothing herein shall be construed as in any manner affecting or interfering with the disposal of property of said City, created under the provisions of Act No. 33, approved March 31, 1877, otherwise than is provided for in Section 14 of said Act.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

H. W. OGDEN,
Speaker of the House of Representatives.

CLAY KNOBLOCH,
Lieutenant Governor and President of the Senate.

Approved 9th July, 1884,

S. D. McENERY,
Governor of the State of Louisiana.

A true copy from the original:

OSCAR ARROYO,
Secretary of State.

DEC 20 1886
JAMES H. McKENNEY

# SUPREME COURT OF THE UNITED STATES,

*OCTOBER TERM, 1885.*

No. 1101.

SUN MUTUAL INSURANCE COMPANY, INTERVENOR, PLAINTIFF IN ERROR,

*versus*

UNITED STATES EX REL. JUDAH HART, DEFENDANT IN ERROR.

No. 1123.

BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS, PLAINTIFF IN ERROR,

*versus*

UNITED STATES EX REL. JUDAH HART.

*In Error to the Circuit Court of the United States for the Eastern District of Louisiana.*

BRIEF FOR DEFENDANT IN ERROR.

E. H. FARRAR,
*Attorney for Judah Hart.*

T. H. Thomason, Printer, 36 Natchez Street.

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H. W. OGDEN,
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Approved 9th July, 1884,

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A true copy from the original:

OSCAR ARROYO,
Secretary of State.

Office Supreme Court U. S.
FILED.
DEC 26 1885
JAMES. H. McKENNEY.
CLERK.

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*In Error to the Circuit Court of the United States for the Eastern District of Louisiana.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

These two causes are, in effect, one and the same case. The first was brought here on a writ of error by the intervenor, and

the second by the defendant, in the case of the United States *ex rel.* Judah Hart vs. The Board of Liquidation of the City Debt of New Orleans, in the Circuit Court for the Eastern District of Louisiana.

By agreement of parties, the records on the two writs have been consolidated in this Court, and are to be tried as one case.

The issue presented in both causes is the same. The defendant in error, having obtained a judgment at law against the City of New Orleans for a large sum of money, based upon municipal contracts, made by the said City during the years from 1871 to 1877, inclusive, issued execution on the said judgment, and seized certain rights and property of the City of New Orleans.

The City took a writ of error, not operating as a supersedeas, from this judgment, and from the judgment, on certain rules which it had laid upon the plaintiff, to quash the executions levied as aforesaid.

While these writs were pending in this Court, a compromise was entered into between Hart and the City, whereby it was agreed that he should release certain portions of the property seized; that he should apply certain other portions of the property seized, *pro tanto*, to the payment of his judgment; and that, for the balance of the said judgment, after making the application aforesaid, he should take bonds to be issued by the Board of Liquidation of the City Debt, under the provisions of Act No. 67 of the Acts of the Legislature for the year 1884.

The plaintiff complied fully with his portion of the compromise. He released his seizure of the property agreed to be released. He applied to the payment of his judgment, *pro tanto*, the amounts collected from the railroad companies, garnishees, and he then made application to the Board of Liquidation of the City Debt, to issue to him the bonds provided to be issued by them under Act No. 67 of the Acts of 1884, and to do the things

which they ought to do, with reference to the said bonds so to be issued.

On this Board's refusal to issue him the bonds, as required in the act of compromise, and as required by the provisions of the Act of 1884 itself, the plaintiff applied to the Court for a writ of mandamus, to compel the execution of his judgment, as contemplated in the compromise, and to that end to compel the Board of Liquidation to deliver to him the bonds, to be issued under the provisions of the Act No. 67 of 1884.

The defense is, that this Act No. 67 of 1884, impairs the obligation of the contract made between the City of New Orleans and the State of Louisiana, with the holders of what are known as the premium bonds, issued under the Act No. 31 of the Acts of 1876 and with the holders of what are known as the extended and certificate bonds, issued by the Board of Liquidation, under and by virtue of Act No. 58 of the Acts of 1882.

The point, wherein it is claimed that the obligation of the contract with these bondholders is impaired by Act No. 67, is that Act No. 67 directs that the bonds issued under these provisions shall be paid out of the same sources, and out of the same funds provided in these two Acts for the payments of the bonds required to be issued under their provisions. No averment is made that the sources are insufficient for the accomplishment of all of the purposes contemplated by all of the three Acts.

The particular attention of the Court is called to this point, and to the further point, that the finding of facts does not declare that these sources are so insufficient.

In accordance with the law and practice of Louisiana, the Sun Mutual Insurance Company intervened, alleging itself to be holder of a large number of both certficate bonds, issued under Act of 1882, and premium bonds, issued under the Act of 1876, and joined the defendant in its assertion of the unconstitutionality of the Act of 1884. The cause was submitted to the Court

without a jury, who found a statement of facts, and, upon this statement of facts, adjudged that the relator was entitled to the peremptory mandamus, as prayed for, and ordered the writ to issue. Both intervenor and defendant took writs of error from this judgment, and the cause is to be submitted to your Honors for decision upon briefs.

## Argument.

In order fully to appreciate the point presented for your Honors' decision, it will be necessary to make a short review of the financial legislation, affecting the debt of the City of New Orleans, from the passage of what is known as the Premium Bond Act, in 1876, down to the passage of the Act of 1884, whose constitutionality is attacked by the defendant and intervenor.

As a preliminary statement to this review, we desire to call the attention of the Court to the fact that, under and by virtue of the provisions of the City Charter adopted in 1870, the City of New Orleans had a power of taxation of one and three-quarters per cent. per annum; that this power of taxation was, by Sections 15 and 16 of Act No. 73 of 1872, approved April 26th, 1872 declared to be limited to one and one-quarter per cent. for City purposes, and absolutely unlimited for the purposes of paying the principal and interest upon the bonded debt, then outstanding and due by the City. In 1876, the pressure of taxes became so great upon the City, that the Legislature adopted Act No. 31 of the Acts of 1876, known as the Premium Bond Act. This is the Act which your Honors declared, in the case of Louisiana vs. Pilsbury, 105 U. S. 278, to be tainted with the leprosy of repudiation. The object of that Act was to compel the refunding of the whole outstanding bonded indebtedness of the City of New Orleans into ($20) twenty dollar premium bonds. The plan contemplated the issuance of $20,000,000 of bonds, all dated 1st July, 1875, and bearing five

per cent. interest from that date, which bonds were to be paid, principal and interest, in accordance with a lottery scheme or drawing; and a certain number of series were to be drawn every year, and only those bonds were to be paid in that year, the numbers of which happened to be drawn.

Under this scheme, only $13,263,300 of bonds were ever issued in exchange for outstanding bonds. The remaining $6,736,700 were not issued, because the holders of the outstanding bonds refused to take them. So that to the extent of $6,736,700, the premium bond plan remains unexecuted, and the premium bonds remain in the hands of the City of New Orleans.

The City has, with the proceeds of certain railroad franchises, purchased, and of course extinguished, $3,567,360, of such bonds. Under the operation of the plan, she has also paid a large proportion of those issued, leaving now outstanding only $7,918,280, of such bonds.

The plan provided for the extinguishment of the whole $20,000,000 in 50 years, from the first of July, 1875, and the number of series to be drawn and paid each year was so arranged as exactly to carry out this plan of extinguishment in fifty years. By the fact of the large purchase aforesaid, and by the fact of the non-acceptance of the said Act by such a large proportion of the said creditors, your Honors will see that in ten years, the debt has already been reduced to nearly one-third of the amount contemplated by the plan.

The holders of the bonds, who refused to participate in the premium bond plan, to-wit: The holders of the railroad bonds and the holders of what is known as the consolidated bonds, litigated with the City of New Orleans, and obtained in this Court judgments and decisions which nullified the limitation of taxes in the premium bond plan to one and a half per cent., and which nullified the repudiating clauses of that plan, which sought to drive all such bondholders into the acceptance of pre-

mium bonds in exchange for their bonds issued under previous Statutes.

We here subjoin a list of the cases decided by your Honors:

U. S. vs. New Orleans, 98 U. S. p. 381; Wolfe vs. Same, 103 U. S. 358; Louisiana vs. Pilsbury, 105 U. S. 278.

The Constitution of 1879, recognizing the financial embarrassment of the City of New Orleans, provided in Art. 254, " that the General Assembly at its next session, after the adoption of this Constitution, shall enact such legislation as may be proper to liquidate the indebtedness of the City of New Orleans, and to apply its assets to the satisfaction thereof.

Under and by virtue of the provisions of this Article, the Legislature of 1880 adopted Act No. 133, which will be found in the appendix to brief of the plaintiffs in error.

The substantial provisions of that Act are:

The Constitution of the body, defendant in this case, known as the 'Board of Liquidation of the City Debt,' which body was given power to retire and cancel the entire floating debt of the City of New Orleans, except the floating debt created up to the passage of this Act, whether represented by bonds of various classes or by judgments; and the organization of a plan for such retirement and cancellation."

The mode provided in the Act for this retirement of the debt was:

1st. By transferring to the said corporation all of the property of the City of New Orleans, both real and personal, not dedicated to public use, which was to be disposed of by the Board of Liquidation on such terms and conditions as it might deem favorable to the parties, and which shall be deposited with the fiscal agent of the Board, to the credit of the City Debt Fund.

2d. By the issuance of fifty year four per cent. bonds which were to be used in the retirement of the debt of the City, at fifty cents on the dollar, either by exchange of the said bonds, or by

the sale of the bonds, at not less than eighty cents on the dollar, and the purchase of the outstanding bonds with the cash.

Section 6 of the Act declared, "that nothing in this Act shall be construed as affecting, or in any manner impairing, the Act No. 31 of 1876, commonly known as the Premium Bond Act, but it shall be the duty of the City authorities to transfer and turn over to the Board of Liquidation of the City Debt all moneys collected on account of the said debt, in accordance with the provisions of the Premium Bond Act, and it shall be the duty of the Board of Liquidation to apportion the proceeds of the said taxes, and apply the same *pro rata*, and in the proportion which each form of bonded debt shall bear to the entire amount of the said debt; and such portions of the said proceeds of taxes as shall not properly belong to the outstanding amount of premium bonds, shall be applied to the payment of interest on the bonds created under this Act."

The Court will see, in this provision, that the Legislature recognized the fact that inasmuch as the premium bond plan had not been accepted in its integrity by the creditors of the City of New Orleans, the whole proceeds of the premium bond tax did not legitimately belong to the small modicum of outstanding premium bonds, but that it belonged in equity to all of the outstanding bonds and valid indebtedness of the City of New Orleans, whether represented by bonds or by judgments, and that only that proportion of it should be appropriated to the outstanding premiums that was necessary to provide for their payment and liquidation.

No bonds were ever issued under this Act, because none of the creditors of the City of New Orleans would accept them. The Courts, State and Federal, having declared that the limitation upon the powers of taxation in the City of New Orleans in the premium bond plan, and in the Constitution of 1879, impaired the obligation of the various contracts made by the City with the

outstanding bondholders, the Legislature, in 1882, was compelled to cease its repudiating tendencies, and to adopt Act No. 58 of the Acts of that year, which is reproduced in full in the appendix to the brief of the plaintiff in error.

This Act authorized the City to renew and extend the payment of her outstanding bonds, other than premium bonds, and to fund into certificate bonds the unpaid coupons prior to the first of January, 1883, and provides for the levy and collection of a special tax to pay the interest on these outstanding bonds and on the certificate bonds.

Section 6 of this Act declares that all funds now, or that may be deposited under this Act in the hands of the Board of Liquidation of the City Debt under existing laws, shall be deposited in the hands of the fiscal agent of the Board and credited to the account known as the City Debt Fund, which fund shall be applied exclusively to the purchase on the most favorable terms, not exceeding par of the face value of any outstanding bonds or coupons, and the certificates therefor which are extended, to be retired under the provisions of this Act; provided that the said City Debt Fund shall be used, first, to provide for and to pay the interest on the bonds and certificates contemplated herein; and it shall be the duty of the Council, in its annual budget, to make an appropriation to carry out the provisions of this act.

The 7th Section provides, that the surplus proceeds, if any, of the premium bond tax of each year, remaining in the hands of Board of Liquidation of the City Debt, or surplus on hand at the time of the passage of this Act, after all of the drawn series, interest and premiums thereon, exigible or due to the holders thereof, have been provided for or fully paid, shall also be deposited with the fiscal agent of the said Board to the credit of the account known as the City Debt Fund, and applied exclusively, as provided in the fifth Section.

Under the provisions of this Act, as shown by the statement of facts, the Board of Liquidation has issued bonds to the extent of $4,609,217.50. The interest on these bonds has been paid by the collected portion of the one-half of one per cent. tax, provided in the said Act, and the deficit between the amount actually collected, and the amount necessary to pay the interest at maturity, has been paid out of the premium bond tax itself; there being necessarily in the hands of the Board of Liquidation every year a large surplus over and above the amount necessary to pay the interest and premiums upon the drawn premiums arising out of the $7,918,280, of outstanding premium bonds.

By Act No. 67 of 1884, Sections 2, 3 and 5 of the Act organizing the Board of Liquidation, and authorizing it to issue bonds, was amended. The 2d Section was amended so as to make this Board of Liquidation have exclusive control and direction over all matters relating not only to the bonded debt, but to the judgment debt of the City of New Orleans.

Your Honors will notice, that the original Section used the words " valid debt, whether represented by bonds or judgments," and simply excluded the floating debt of the City of New Orleans, which had been created up to the time of the passage of that Act.

The amended Section goes on to provide that the Board of Liquidation shall cause to be prepared bonds of the City, to be signed by the Mayor and Treasurer of the City, countersigned by the Comptroller; to be dated June 1st, 1884; to be made payable fifty years from date, or sooner, at the option of the City, and to bear interest at the rate of five per cent. per annum from the date of the said bonds, and payable semi-annually.

The 3d Section of the Act No. 133 of 1880, was amended, so as to make it the duty of the Board of Liquidation to retire and cancel the entire debt of the City of New Orleans, now in the form of executory judgments, and registered under the provisions

of Act No. 50 of 1870, and all that may hereafter become merged into executory judgments and likewise registered. In order to retire this debt, it is made the duty of the Board either to sell the bonds or to exchange them for these judgments at par.

The 5th Section of the Act was amended and re-enacted so as to read: "That it shall be the duty of the City of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this Act, all of the property of the City of New Orleans, real or personal, not dedicated to public use; *provided*, that in the sale of batture property, which is herein included, the right of the City to all future accretions shall be reserved; all assets of the said City, realized and to be realized, except such assets and revenues as pertain to the administration of said City, and necessary for the support of the same, as at present authorized; all uncollected revenues of said City, anterior to the year 1879, when collected; and the said Board is hereby authorized, and required, to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said Board may deem to be to the best interests of the City, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected:

*First.* To the payment of the interest on the bonds authorized herein, in the event that the tax authorized by the Section 11 of the said Act No. 133, approved April 10th, 1880, be not levied.

*Second.* To the redemption and cancellation of the said bonds; *provided*, that bids for the sale of the same shall be by sealed proposals, and that preference shall be given to the lowest bidder; and, *provided further*, that no bids above the par value of the said bonds shall be accepted.

The 4th Section provides, that for the further redemption of the said bonds, the said Board of Liquidation is hereby authorized and required, after each and every allotment of series following

the passage of this Act to advertise for sealed proposals, for the exchange of drawn premium bonds in possession of the City for the bonds authorized herein to the amount of fifty thousand dollars, of said bonds issued under this Act; *provided*, that no exchange be made, unless preference be given to the lowest bidder.

I.

It seems to us absolutely essential that the defendant and the intervenor should have both averred and proved, and that the Court should have found, that the funds coming into the hands of the Board of Liquidation of the City Debt from the premium bond tax, from the tax of one-half of one per cent., to be levied under the Act of 1882, and from the proceeds of the sale of the assets of the City of New Orleans, known as the City Debt Fund, were and are insufficient for the purpose of carrying out the accepted portion of the premium bond plan, for the payment of the interest and sinking fund of the extended and certificate bonds, issued under the Act of 1882, and for the payment of the interest and sinking fund of the bonds provided to be issued under the Act of 1884, the validity of which is in question here.

If these funds are sufficient for the execution of all of these purposes (and the presumption of law is that they are), then, it appears to us, that there is no lawful reason why the Legislature could not provide that the surplus of the funds necessary to carry out the premium bond law, and necessary to carry out the extended bond law, should be applied to the payment of the other indebtedness of the City of New Orleans, which accrued, as the indebtedness in question did, prior in time to the premium bond law, and to the Act of 1882, itself.

II.

It is perfectly clear, that if this Act of 1884 violates the premium bond law, by providing that fifty thousand dollars a year

of the undrawn and of the unissued premium bonds shall be applied to the retirement of this debt, then the Act of 1882, also violates that law which declares, that the whole of the proceeds of the premium bond tax, over and above what is necessary to pay the outstanding issued premium bonds, shall be applied to the payment and retirement of the bonds issued under its provisions.

Why is it that this Board of Liquidation should be so eager to execute the Act of 1882, which violates the premium bond law, and not to execute the Act of 1884, which violates it in a very much smaller extent?

How can the intervenor, who stands before the Court holding both series of bonds, with any consistency complain of this Section as violative of the Premium Bond Act?

III.

Section 10 of the Premium Bond Act declares, that no City property of any kind shall hereafter be sold or conveyed in any manner, except the proceeds be applied to the reduction of the bonded and floating debt. This was a specific dedication, contemporaneous in origin with the Premium Bond Act itself, of all of the property and assets of the City to the payment of either the bonded or floating debt. After the passage of this Act, when any City property was sold or disposed of, it was optional either with the Legislature or with the City Council to say to which the classes of the indebtedness it should go. If, in their discretion, they declared that the proceeds of such property should go the bonded debt, the floating debt creditors could not complain. Or *vice versa*, if they should declare that the proceeds should be applied to the payment of the floating debt, the bonded debt creditors could not complain. This point was decided in the case of the State ex rel. New Orleans Gas Light Co. vs. The Mayor of the City of New Orleans, 32 La. An. p. 268; and it

was affirmed by your Honors on a writ of error to this Court, reported in Louisiana ex rel. vs. City of New Orleans, 108 U. S. 568.

In the Act of 1880, organizing a Board of Liquidation, and authorizing it to issue the bonds therein provided—in the Act of 1882, authorizing the issuance of the bonds, held by the intervenor, and in the Act of 1884, authorizing the issuance of the bonds which the relator demands, the Legislature has undertaken, as a mere auxiliary provision, for the payment of the bonds, to direct that the general assets of the City, coming into hands of the Board, shall be applied to the joint liquidation of the principal and interest of each series of bonds.

IV.

Under the provisions of Article 254 of the Constitution, it was the duty of the Legislature to apply all the assets of the City of New Orleans to the payment of its creditors equitably; and it was not in the power of the Legislature to apply all the assets of the City to the payment of one creditor, or one class of creditors, and exclude all of the other classes from participating in such property. From the point of view of that Article in the Constitution, the Act of 1884 was simply a rectification of the unjust provisions of the Act of 1882. It was upon this ground that Judge Billings decided, the injunction proceedings levelled against this same Act by the Sun Mutual Insurance Company, the intervenor herein, against the Board of Liquidation. Judge Boarman has made that opinion of Judge Billings a part of his opinion and decree in this case, and your Honors will find the opinion printed in the appendix to this brief.

V.

The only portion of the Act of 1884, which can be held to affect the Premium Bond Act, is that portion which declares that fifty thousand dollars of the unissued bonds should be annually

applied to the retirement of the bonds issued under its provisions. As stated above, if this provision is unconstitutional as to the bonds of 1884, then similar provisions as to the bonds of 1882 are, also, unconstitutional, and the holders of the bonds of 1882 cannot be heard to urge such unconstitutionality.

What interest, now, have the holders of premium bonds to urge its alleged unconstitutionality?

They contracted with the City in the belief that the whole $20,000,000 of premium bonds would be issued; that the number of series to be drawn annually would represent only issued bonds, which would participate in the proceeds of the tax. What business have issued bonds in contesting what should be done with the unissued bonds? What right have the seven million and odd thousands of bonds to dictate to the Legislature and to the City what they shall do with these millions of unissued bonds? The law provides, that the unissued bonds should be issued.

They have not been issued up to this date; their numbers still remain in the wheel; they still participate in the drawings; when any of them are drawn, the City, instead of paying out the money, keeps it in her treasury. All of the bonds which were entitled to be exchanged for these unissued bonds have refused to accept them, and have accepted the provisions of the Act of 1882, which provides for their retirement a special tax, equal in amount to the whole premium bond tax.

## VI.

We readily concede the point taken in the brief of the plaintiff in error, that if this Act of 1884 is unconstitutional as to the mode and manner providing for the payment of the bonds to be issued under it, then the whole Act is unconstitutional; because it would be an absurdity to say that an Act was constitutional so far as it provided for the issuance of bonds, and unconstitu-

tional as to the other provisions of the Act which provide for the means of paying or liquidating the bonds or interest so provided to be issued; and we concede that if your Honors should come to a conclusion adverse to that arrived at by the Circuit Court, that a final judgment should be entered here against the relator, rejecting his demand.

Respectfully submitted,

E. H. FARRAR,

*Attorney for Judah Hart.*

# APPENDIX.

## *CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA.*

THE SUN MUTUAL INSURANCE COMPANY *vs.* THE BOARD OF LIQUIDATION OF THE CITY OF NEW ORLEANS.

Before Judge Edward C. Billings: Messrs. Henry J. Leovy, White & Saunders, for plaintiffs, Henry C. Miller, for defendants.

This matter is submitted upon a bill of complaint, and affidavits and exhibits on behalf of the complainants, and affidavits and documents on behalf of the respondents, upon an application for an injunction.

The complainants are holders of "extended bonds," and of "coupon certificates," under the Act of 1882, and as such holders they seek to enjoin the respondents from issuing the bonds provided for under the Act of 1884 to judgment creditors, upon the ground that the means provided for the payment of the latter are more or less identical with those set apart for the payment of the former.

After a consideration of the arguments which were urged with such ability upon this question, it seems to me to be unnecessary to pass upon it. Without passing upon this question, even if the construction of the two Acts be such as is contended for by complainants, there is, nevertheless, an impediment in the way of enforcing the grant of the Act of 1882, so far as relates to the judgment creditors, included in the provisions of the Act of 1884.

Both Acts relate to the surplus arising under or out of the taxes levied in pursuance of the Act creating the premium bond

system and other property. Since this surplus is an annual result for a great number of years, wrought out by the fact, that only a portion of the bonded creditors became participants in the scheme, it is, in its nature and capacity, to be disposed of, either by the Legislature or by the debtor, subject to the same legal limitations and rules as any other property.

Until the Legislature had given to a creditor a grant or legislative permission to share in this property, it would have been impossible for him to present the question of his right to a share in this residue of a tax, but by the Act of 1884, judgment creditors have been placed in such a situation that they can lawfully present the question of their right to a participation in this residue, to the extent which this Act recognizes their right.

It is to be observed that the Act of 1884, under which the judgment creditors claim, includes only such judgments as had been, or should be, obtained against the City of New Orleans, for debts which had an existence prior to the year 1879. It relates, therefore, only to debts owed antecedently to its passage, and has no reference to debts thereafter arising. The debts represented by the extended bonds and the coupon certificates, which form the basis of the claim of the complainants, were also pre-existing, having been owed by the City for many years. The debts on both sides of this controversy, therefore, were debts in existence antecedently to the passage of the Act of 1882.

The Article No. 3150 (old) of the Civil Code had been in force as a part of the law of the State since the year 1825. That Article is as follows: "The property of the debtor is the common pledge of his creditors."

So far as the Legislature allows municipal corporations to become debtors, they are, equally with individuals, within the dominion of this law.

Since the power of taxation is vested in the Legislature so far as concerns the fresh levy of taxes, this rule, however binding

in equity and upon the conscience of the legislators, could not be enforced.

So far, also, as future debts are concerned, the Legislature could to any extent exclude their holders from participation in the property of a debtor. But so far as pre-existing debts are concerned, and so far as relates to any revenue which, though springing from a tax, had come to have the qualities of property, *i. e.*, so far as relates to this surplus and the other property about which this contention is made, the Legislature had no power to make any transfers or assignment which should not be rateable among all the creditors similarly situated as to the absence of liens. This provision of the statute guaranteeing to all the creditors this impartial distribution had entered into all these transactions on both sides, both as a limit and a guarantee, and had the force and effect of a paramount law, and restricted the old bondholders from taking, merely by virtue of the Act authorizing the issue of these new obligations, any portion of the property of the debtor, which would leave any class of creditors then existing without a proportionate provision or means of payment cut of the debtor's property.

Did the Act of 1882, if construed as it is contended for by the complainants, do this?

Using words in a general sense, the debtor had no property upon which a writ of *fieri facias* could operate.

The Act of 1876 had, so far as the matter was capable of legislative restriction, limited the authority of the City to levy taxes to 15 mills on the dollar. Five mills of this had been devoted to the premium bonds. By the Act of 1882 five mills, if necessary, had been devoted to these extended bonds and coupon certificates. The alimony of the City, using that word to include the expenses absolutely necessary to enable the City government to discharge its purely public functions or duties, has been abundantly established to consume at the very least five mills.

The judgment creditors had been deprived, by Article 1 of the Miscellaneous Ordinances, subdivision 3 of the Constitution of 1879, of all opportunity of using their judgments in the payment of taxes. The hollow and empty provisions of the Act of 1870, No. 5, had been judicially declared to be satisfied by the annual devotion, on the part of the City, of an amount merely nominal for the payment of hundreds of thousands of dollars of judgments. Unless, then, the judgment creditors could participate in that portion of the five mill premium bond tax, which remained after all who had any right thereto had been paid, they were left with a debtor who had been stripped of every means of paying any portion of these judgments.

If, then, it was the intention of the Legislature, as is contended by the complainants, by the Act of 1882, to transfer to the extended bond and coupon certificate holders all of this surplus, and that intention should have operation, it would result that where there were two classes of creditors with already existing debts, the legislative Act could, by a transfer or appropriation of a debtor's property, give to one class a preference to the exclusion of the other class to such a degree as to give to one class an immediate and annual source of payment and postpone to the other all payment for possibly a period of forty years.

I think the judicial decision of all courts, and especially of our own, have declared such a preference prohibited.

For the doctrine of the statute compelling equal distribution or provision among or for co-existing creditors, *i. e.*, to prevent any partial appropriation by the debtor. See Succession of Taylor, 10 An. p. 510, and an affirmation of the law of that case in Milne, Widow, vs. Schmidt, 12 An. 553. This statutory rule operates upon the Legislature as well as upon the debtor. It is no more in the power of law makers than of debtors, to effect an unequal distribution of the debtor's estate by making an application or transfer thereof among creditors already existing.

This also has been judicially declared. In the Atchafalaya Railroad and Banking Company vs. Bean, 3 Rob. 315, the Court says:

"I think it clear that the Legislature cannot constitutionally, by Act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor or the relative rank of creditors *inter se*, and that two creditors who stood equal originally in the eyes of the law, and had an equal privilege to be paid, neither having any special lien or privilege over the other, must remain forever equal, notwithstanding any Act of the Legislature sanctioning a different doctrine."

Unless, then, the old bondholders have some privilege upon the excess, it could not be *in toto* given by the Act of 1882 to the exclusion of already existing judgment creditors.

But the old bondholders had no privilege upon this excess. By the Acts under which the different series of bonds were authorized, a right to a tax was given, which remains in all its original force, except as waived by the holder's own volition. But this is altogether distinct from any premium bond excess, and if it was to be considered at all, would be an obstacle rather than aid to the complainants. For it would present the case of a complainant with a perfect security asking to have a preference in his favor maintained as against another creditor who had no security whatever. Until the old bondholders assented to the premium bond plan, by an exchange of his bond, he could claim nothing under it. Till such acceptance the Premium Bond Act stood as an unaccepted and, therefore, inoperative offer.

The provision that the drawn premium bonds should be applied to the purchase of the old bonds, until in some way assented to by the holders was, so far as relates to such holders, a mere legislative provision, having no quality of a contract. In fact, the Act of 1880 had altogether recalled this provision.

It was argued, *in arguendo*, that Section 10 of the Act of 1882

The judgment creditors had been deprived, by Article 1 of the Miscellaneous Ordinances, subdivision 3 of the Constitution of 1879, of all opportunity of using their judgments in the payment of taxes. The hollow and empty provisions of the Act of 1870, No. 5, had been judicially declared to be satisfied by the annual devotion, on the part of the City, of an amount merely nominal for the payment of hundreds of thousands of dollars of judgments. Unless, then, the judgment creditors could participate in that portion of the five mill premium bond tax, which remained after all who had any right thereto had been paid, they were left with a debtor who had been stripped of every means of paying any portion of these judgments.

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guaranteed the continuous application of the drawn premium bonds to the purchase of the old bonds, according to Sections 11 or 5 of the Premium Bond Act. But the carefully selected words of that Section of the Act of 1882 exclude such an interpretation, and merely declare the whole Act a contract, which may be enforced by "every judicial process then in force or in force at the time of the creation of the debt,"—*i. e.*, the rights to be enforced were those created by the Act of 1882. The process for their enforcement should be that in force in 1882, as well as that in force at the time of the issuing of the bonds. This Section defines and secures the means of enforcing the rights of the holders of the new securities, but does not enlarge those rights. The Act of 1882 correctly assumes that its own force alone was to operate to transfer this surplus, and if it was not in the power of the Legislature at that time to exclude the judgment creditors from an equal participation in it, then the complainants have failed to establish their case.

The conclusions which followed from the facts and the law of the case are:

1. That whatever provisions are contained in the Act of 1882, subjecting any property or means of payment, which could be lawfully appropriated, to the payment of the extended bonds or coupon certificates, having been assented to on the part of the holders by accepting of the extension, is a contract which cannot be varied by any change or substitution, no matter how minute, and will continue in its operation upon whatever has been so appropriated till the obligations thereby secured shall have been fully paid.

2. If the language, in the Act of 1882, did include the excess of the premium bond tax, and the other property included in the grant under the Act of 1884, while it would be valid as a contract between the complainants, the holders of the new obligations, and the City, so far as concerns all the other parties it would

be void as far as concerns the judgment creditors whose judgments are for debts existing antecedently to the passage of the Act of 1882, under which the complainants claim up to the point of the said judgment creditors being admitted to a proportionate or rateable share of such excess, and other property.

3. It follows, therefore, that as the Act of 1884 authorizes the issuance of bonds only to creditors who have obtained judgments for debts existing antecedently to the time of the passage of the Act of 1882, the injunction must be refused.

APPENDIX.

| | |
|---|---|
| Amount of coupons funded into coupon certificates due within 10 years, under Section 4 of Act of 1882 | $1,913,617 50 |
| Amount of bonds extended 40 years, under Sec. 3 | 2,695,600 00 |

Both coupon certificates and extended bonds are payable at any time, at option of the City.

| | |
|---|---|
| Six per cent. on coupon certificates | $114,817 00 |
| Six per cent. on extended bonds | 161,736 00 |
| Total interest | $276,533 00 |
| Value of property subject to taxation in New Orleans | $115,000,000 00 |
| Five mills upon each dollar gives | 575,000 00 |
| Deduct ordinary shrinkage, 20 per cent., leaves 80 per cent | 460,000 00 |
| Deduct amount necessary to pay total of first years interest | 276,533 00 |
| Leaves to be applied to bonds and certificates | 183,447 00 |
| Say in round numbers | 180,000 00 |
| So that the amount reduced in 1885 would be | 180,000 00 |
| In 1886 | 190,000 00 |
| In 1887 | 202,000 00 |
| In 1888 | 227,263 00 |

| | |
|---|---|
| In 1889 | 240,898 00 |
| In 1890 | 255,351 00 |
| In 1891 | 270,672 00 |
| In 1892 | 286,914 00 |
| Total | $2,068,818 00 |

So that, prior to January 1, 1893, which is the day of the maturity of the coupon certificates, they would be paid and wholly withdrawn.

There would be left, thereafter, the entire net proceeds of the five mill tax, *i. e.*, $460,000, to be applied annually, in the first place, to the payment of the interest of the extended bonds, and secondly, to the payment of the extended bonds.

| | |
|---|---|
| Net amount of tax, deducting 20 per cent. for shrinkage. | $460,000 |
| In 1893—First year's interest on extended bonds | 161,736 |
| Balance for payment of extended bonds | $298,264 |
| In 1894 | 316,259 |
| In 1895 | 335,133 |
| In 1896 | 355,243 |
| In 1897 | 376,558 |
| In 1898 | 399,151 |
| In 1899 | 427,100 |
| Total | $1,507,710 |

So that, prior to January 1, 1899, just twenty-three years before the extended bonds are compulsorily due, both the extended bonds and the coupon certificates would be wholly paid and withdrawn.

DEC 31 1885
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

*OCTOBER TERM, 1885.*

No. 1101.

SUN MUTUAL INSURANCE COMPANY, INTERVENOR,
PLAINTIFF IN ERROR,

*versus*

UNITED STATES EX REL. JUDAH HART, DEFENDANT IN ERROR.

*Supplemental Brief of the Sun Mutual Insurance Company in Reply to the Brief of Defendant in Error.*

H. J. LEOVY & G. J. LEOVY,
E. D. WHITE,
J. P. BLAIR,
*For Sun Mutual Insurance Company.*

T. H. Thomason, Printer, 33 Natchez Street.

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Office Supreme Court U. S.
FILED.
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We desire to notice briefly some points in relator's brief and to call the attention of the Court to a serious error contained in the opinion of Judge Billings, printed in the appendix to the brief.

The relator tacitly admits, what he cannot gainsay, that the funds provided for the payment of the bonds of 1884 are identical with the funds previously pledged to the bonds of 1882. He contends, however, that the Act of 1884 is not amenable to any constitutional objections on this account, unless and until the holders of the bonds of 1882 prove that the requirements of their bonds cannot be satisfied out of that portion of the pledged funds which may remain after the provisions of the Act of 1884 are executed.

An analysis of this reasoning will show that it is founded on a syllogism which has for its major premise an incorrect legal proposition, and for its minor premise an erroneous statement of fact. Thus, major premise: When, by a contract to secure a debt, certain securities have been given to the creditor, it constitutes no violation of this contract for the debtor to take away a part of the securities, when they seem to him more than sufficient to secure the debt; and, in case of dispute, the burden of proof is on the creditor to show that the remaining securities are insufficient. Minor premise: The funds and revenues pledged in the Act of 1882 are sufficient to pay the interest and provide a sinking fund both for the bonds of 1882 and the bonds of 1884. Conclusion: Hence, the Act of the Legislature, directing that these funds shall be *first* applied to the payment of the interest and to provide a sinking fund for the bonds of 1884, impairs no contract rights of the holders of the bonds of 1882.

The mere statement of the major premise is a sufficient refutation of it, and we might rest our answer to this part of relator's argument by calling the attention of the Court to the unsoundness of the legal proposition upon which it depends. But it can be easily shown that the minor premise is as erroneous, in point of fact, as the major premise is unsound in law. The tax of one-half of one per cent. and the other funds pledged to the bonds of 1882 are not sufficient to meet the requirements of these bonds and the bonds of 1884. In the first place, the holders of the extended bonds of 1882 have to share this tax with the holders of outstanding bonds who did not accept the provisions of the Act of 1882, (see intervenor's opening brief, p. 6.) The proportion of the tax coming to the bonds of 1882 is insufficient even to pay the interest on the bonds. (R. pp. 13 and 14, at bottom.) This deficiency was made up by a resort to the surplus of the premium bond tax. But this means of averting a default in the payment of interest will be exhausted if the pro-

visions for the payment of the bonds of 1884 are carried out. The Act requires, that *after each drawing* $50,000 of drawn premium bonds shall be exchanged for the bonds of 1884. There are now four drawings. The surplus of the premium bond tax, say for 1884, was the difference between $429,155.47, the amount of tax actually collected, and $346,836, the amount of tax required for extant premium bonds. This surplus would soon be exhausted in paying the $200,000 of drawn premium bonds required by the Act of 1884 to be annually exchanged for the new bonds.

What would be left to supply the annual deficit in the interest on the bonds of 1882, and to provide a sinking fund for the payment of the principle? Nothing but the assets of the City which *may*, from time to time, come into the hands of the Board of Liquidation. The record does not show that there are any funds in the hands of the Board due to this source, or that there ever will be. A city burdened with debts, as New Orleans has been shown to be, is not apt to have a very large or a very constant revenue arising from "property, real or personal, not necessary for its administration or support." Yet, of even this uncertain means of payment, the bonds of 1882 are deprived by Section 3 of the Act of 1884, which provides that this fund shall be applied *first* to the payment of the principle and interest of the bonds of 1884.

In view of this state of facts, we submit that it is patently erroneous to pretend that the means of payment of the bonds of 1882 are substantially unimpaired by the Act of 1884, and that it is obvious intervenor and others who, in good faith, acquired their bonds in reliance upon the provisions for their payment solemnly pledged by the Legislature of this State, have abundant cause for complaint.

The relator next argues, that *quoad* the disposition of the surplus of the premium bond tax, the Act of 1882 is just as unconstitutional as the Act of 1884. This proposition, if correct, has no

bearing on the case. The constitutionality of the Act of 1882 is not at issue. If the Act of 1884 is unconstitutional, the Board of Liquidation were right in refusing to execute its provisions, and their duty, in this respect, will not be in the least affected by showing that the Act of 1882 is also unconstitutional.

We submit, moreover, that it has been clearly shown in the intervenor's opening brief, and in the brief of the Board of Liquidation, filed in suit No. 1123, which has been consolidated with the instant case, that there is no conflict between the Premium Bond Act and the Act of 1882, as to the disposition of the surplus of the premium bond tax. (Intervenor's brief, pp. 19, 21; brief of Board of Liquidation, p. 4.)

The only answer which relator makes to the objections to the Act of 1884, presented by the intervenor as the holder of premium bonds, is that premium bondholders have no interest in urging the unconstitutionality of that Act. This branch of the case has been sufficiently discussed in our opening brief, where we pointed out in what respect the Act of 1884 injured the premium bondholders, and in what respect it violated their contract rights.

The Premium Bond Act will be found in the appendix to the brief of the Board of Liquidation, plaintiff in error. The Act dedicated to the payment of the *bonded* debt, all of the tax which it authorized to be levied. The Act itself contemplated the contingency that all of the premium bonds would not be issued, and that there would, therefore, be a surplus of the premium bond tax; but the Act itself directed the disposition which should be made of this surplus. The Act of 1884 violates the premium bond contract by altering the destination of the premium bond tax, and directing a certain portion of it (greater than the annual surplus) to be applied to the payment of an entirely different class of creditors from those contemplated by the Premium Bond Act. The Act of 1884 further violates this contract by forcing upon it a

construction which makes it inconsistent with itself and unconstitutional. (See Intervenor's brief, pp. 19-21, 23.)

As to the injury suffered by the premium bondholders, we need only refer the Court to our opening brief (p. 22), where it is shown that the diversion of the premium bond tax, proposed in the Act of 1884, takes away so large a portion of the tax as to leave an amount entirely inadequate to meet the requirements of the premium bond scheme.

The relator has annexed to his brief a copy of the opinion of Judge Billings, rendered in an injunction suit, directed against the Act of 1884. Before discussing the reasons upon which the decree in that suit is founded, we wish to correct an error which must have had a great influence upon the decision of that case.

Judge Billings assumes that the holders of extended bonds get the *whole of the 5 mill tax* authorized to be levied by the Act No. 58 of 1882. He seems not to have been aware of the existence of Section 6 of Act No. 68 of 1882, which reads as follows:

"SEC. 6. *Be it further enacted, etc.*, That this Act shall only take effect in case the settlement provided for and proposed in Act passed at the present session of the General Assembly, entitled 'An Act to authorize the City of New Orleans to renew and extend payment of her outstanding bonds other than Premium Bonds; to provide the rate of interest on the bonds as renewed or extended, and authorize the levy of a tax to pay the same,' shall not be accepted by the holders of the bonds therein provided for, and the tax authorized by this Act shall not be levied and collected if the tax authorized by the said Act providing for the settlement of the debt shall be enforced; and in case said settlement shall be accepted by only a portion of the holders of said city bonds, then only a portion of the tax provided for in this Act shall be levied sufficiently in amount to meet the requirements of the other bonds, and only a portion of the tax provided for in said Act for the settlement of the City Debt, sufficient to meet the

requirements of the bonds whose holders accept said proposition; it being the intention that not more than five mills shall be levied under either or both Acts for the benefit of the bonds of the City of New Orleans, other than premium bonds."

We have had occasion to discuss the effect of this Act in our opening brief, pp. 6, 7.

In ignorance of this Act, Judge Billings has annexed to his opinion an appendix, in which he shows, that giving to the extended bonds the whole of an annual 5 mill tax, these bonds will be fully paid and retired twenty-three years before they are compulsorily due. Hence, he regards the holders of extended bonds as creditors, abundantly supplied with ample means for obtaining payment of what the City owes them, yet greedily seeking to retain other funds not at all needed to secure the full and punctual payment of their debt. But, unfortunately for the holders of extended bonds, they are not in a position to act like the dog in the manger. A consideration of the Section of the Act of 1882, above quoted, and of the finding of facts (R. pp. 13 and 14, at bottom) will show, that the five mill tax is not sufficient to pay the interest on the extended and unextended bonds of the City. The law requires it to be rateably applied to these two classes of bonds, which include all the bonds of the City of New Orleans other than premium bonds. Hence, the proportion of this tax coming to the extended bonds is not even sufficient to prevent a default in the payment of the interest annually due on them.

Judge Billings supports the decree rendered in the case referred to by the following course of reasoning: The Act of 1882 dedicates certain funds and revenues to the holders of outstanding bonds of the City of New Orleans other than premium bonds. At the time of the passage of this Act, the outstanding bonds had no greater right to these funds than existed in favor of judgment creditors of the City, for whose benefit the Act of 1884 was passed.

The rights of these two classes of creditors, being equal at this time, it was not competent for the Legislature to alter the status of these co-existing creditors, and to give to one class a right or privilege on any funds of the City to the exclusion of the other class.

This reasoning is based on the assumption, that at the date of the passage of the Act of 1882, the holders of outstanding bonds, and judgment or floating debt creditors, had an equal right to look for payment of their debts out of the surplus of the premium bond tax and out of the assets of the City in the hands of the Board of Liquidation. But this assumption is utterly erroneous.

The right of the holders of extended bonds to the surplus of the premium bond tax was not created by the Act of 1882. It had its origin in the Premium Bond Act itself. It came into being at the same time that the premium bond tax was created. See Sec. 11 of Act No. 31 of 1876; Rivet case, 35 La. An. pp. 140, 142, quoted in Intervernor's brief, p. 21 Surely, the power which could create the tax was competent to determine what disposition should be made of it. It is not pretended, and there is not the slightest ground for claiming, that the judgment or floating debt creditors of the City had any right whatever to any part of the premium bond tax, before the passage of the Act of 1884. How, then, can they claim that the Act of 1882 impairs their vested rights on a fund, when, by the very Act which called it into existence, the Legislature excluded them from any participation in the tax, and directed the portion of it which might not be necessary for extant premium bonds to be devoted to the payment of the unfunded *bonded* debt of the City.

In regard to the assets of the City in the hands of the Board of Liquidation, the Supreme Court of Louisiana, in a decision rendered *before* the passage of the Act of 1882, recognized the right of the *bonded* creditors to this fund, and directed the

Board of Liquidation to apply it to the extinction of the bonded debt. We refer to the case of Board, etc. vs. City, 32 La. An. 915, which was discussed in intervenor's brief, pp. 11-13.

Hence, it was an error to assume that judgment creditors ever had an equal right with the bonded creditors to the funds and revenues which the Act of 1882 pledged to the latter class of creditors. And the Act of 1882 is not amenable to the objection that it deprives judgment crditors of any of their vested rights, or that it alters the relative rights of bonded and judgment creditors *quoad* the funds which it pledged to the extended bonds.

Judge Billings also assumes, in his opinion, that the pledge contained in the Act of 1882 was without consideration. We have shown that the advantages accruing to the City from this contract with the bondholders were very considerable. (See Intervenor's brief, p. 5.)

It is scarcely necessary, then, to discuss whether or not it would have been competent for the Legislature to have made the pledge contained in the Act of 1882 without consideration, if, at the date of the passage of the Act, the bonded debt and the judgment debt had stood in the same relation to the premium bond tax and the assets of the City in the hands of the Board of Liquidation. Judge Billings, in his argument on this subject, states, and it is a necessary link in his chain of reasoning, that the City was insolvent at the time the Act of 1882 was passed. There is no averment or proof in the pleadings or record of the present case, that the City was insolvent at that date.

Moreover, an examination of the authorities quoted by Judge Billings will show that they do not furnish any support for his conclusion, that a municipal corporation, like the City of New Orleans, with its revenues under the control of the Legislature, and not subject to seizure, with its resources for paying its debts by means of taxation, is subject to the Articles of the Civil Code

intended to regulate the transfer of private property in times of insolvency.

An abstract principle of law contained in the Civil Code, itself an Act of the Legislature, about a debtor's property being the common pledge of his creditors, is quoted to invalidate a pledge made in a subsequent Act of the Legislature. It may well be doubted, whether this Article of the Civil Code confers any greater rights on creditors than they would have had if this truism of law was not found in the Code. It has been shown above, that judgment creditors had no vested right, at the time of the passage of the Act of of 1882, to the funds dedicated in that Act to the bonded debt. Hence, if there is any conflict between the Article of the Code above referred to and the Act of 1882, the earlier Act must be considered as repealed by the later Act, so far as they may conflict.

It will be observed, that nothing in the opinion of Judge Billings has any bearing upon the rights which intervenor, as the holder of premium bonds, claims under the premium bond contract, and which we have endeavored to show in our opening brief, will be violated if the provisions of the Act of 1884 are carried out.

We submit that the judgment of the lower court should be reversed and relator's prayer for a mandamus rejected.

Respectfully submitted,

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